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No. 12628

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United States  
Court of Appeals  
for the Ninth Circuit.

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SUNBEAM FURNITURE CORP., ARTHUR  
M. LUSTER, MELVIN R. LUSTER and  
FRIEDA LUSTER, Doing Business as SUN-  
BEAM FURNITURE SALES CO.,

Appellants,

vs.

SUNBEAM CORPORATION,

Appellee.

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SUPPLEMENTAL  
Transcript of Record

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Appeal from the United States District Court,  
Southern District of California,  
Central Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Southern  
District of California, Central Division

No. 8727-Y Civil

SUNBEAM CORPORATION, a corporation,

vs.

Plaintiff,

SUNBEAM FURNITURE CORPORATION,  
et al.,

Defendants.

Honorable Leon R. Yankich, Judge Presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Tuesday, February 14, 1950

Appearances:

For the Plaintiff:

ROGERS AND WOODSON, by:  
BEVERLY W. PATTISHALL, ESQ.,  
122 South Michigan Avenue,  
Chicago, Illinois;

JOHN F. McCANNA, ESQ.,  
5600 Roosevelt, Chicago, Illinois;

LYON & LYON, by:  
REGINALD E. CAUGHEY, ESQ.,  
811 West Seventh Street,  
Los Angeles, California.

For the Defendants:

HUEBNER, BEEHLER, WORREL,  
HERZIG & CALDWELL, by:

VERNON D. BEEHLER, ESQ.,  
610 South Broadway,  
Los Angeles, California.

Tuesday, February 14, 1950. 2:00 P. M.

The Court: All right, gentlemen.

Mr. Pattishall: Miss Wilson.

RUTH L. WILSON

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Miss Ruth Wilson.

Direct Examination

By Mr. Pattishall:

- Q. Would you give me your full name, please?
- A. Miss Ruth L. Wilson.
- Q. Where do you live, Miss Wilson?
- A. 2328 Hollister Terrace, Glendale.
- Q. What is your occupation, Miss Wilson?
- A. I work for my father in an appliance shop in Glendale.
- Q. What is the name of that business?
- A. J. H. Wilson Appliance Shop.

(Testimony of Ruth L. Wilson.)

Q. How long has your father owned that business?

A. Well, 20 to 25 years we have been in business.

Q. How long have you done work in the shop?

A. Well, ever since I can remember, since I have been a little girl. I have been raised in it. [79]

Q. You work there full time now?

A. Yes, sir.

Q. How long have you been working there full time? A. Since 1946.

Q. Did you ever deal with the trade?

A. Yes, sir.

Q. Is that a matter of regular experience?

A. Yes, sir.

Q. How long has that been going on?

A. Oh, all of that time and prior. All the way through high school.

Q. What sort of merchandise does the store sell?

A. Electrical household wares.

Q. Is it a retail store? A. Yes, sir.

Q. Would you name some of the lines that you handle?

A. Well, we have large appliances, washers and ironers and refrigerators. And then the small appliances.

Q. What brands do you handle?

A. In the large or in the small?

Q. Just name a few.

A. Maytag and Easy and Servel, General Electric, Sunbeam.

Q. Is that more or less a complete description of the merchandise that your store sells? [80]

(Testimony of Ruth L. Wilson.)

A. You mean the electrical goods?

Q. No. If there is some other merchandise, will you tell us what that is, please?

A. Well, hand irons, toasters and waffle irons and mixers.

Q. You mentioned the Sunbeam line. Do you handle the complete Sunbeam line?

A. Yes, sir.

Q. What company puts that line out, do you know? A. The Sunbeam Corporation.

Q. When people come into your store to buy a product of that company, what do they ask for?

A. They will ask for a Sunbeam iron or toaster, waffle iron.

Q. What do you give them?

A. Whatever they ask in the Sunbeam line.

Q. Is that what they appear to expect to get?

A. When they ask specifically for it.

Q. How long have you yourself been familiar with the Sunbeam line by that name?

A. Well, ever since I have been in the store, since I have been old enough to know.

Q. Do you ever do any buying for the store?

A. Yes, sir.

Q. Is that a large part of your duties? [81]

A. That is part of them.

Q. Do you ever order any Sunbeam products?

A. Yes, sir.

Q. By what name do you order, when you want some Sunbeam products?

(Testimony of Ruth L. Wilson.)

A. Just Sunbeam toaster or waffle iron.

Q. Have you ever heard of the Sunbeam Furniture Corporation, the defendant in this case?

A. Yes, by advertisements.

Q. Have you ever purchased anything from them? A. Yes.

Q. Would you tell me about it, please, in your own words, briefly?

A. Well, we were asked to purchase a Sunbeam lamp and we called the Sunbeam Furniture Company and they sent a salesman out and we ordered it, and we picked one up. We had an order for two, and we went down and picked one up. And we received it. And then later we received an additional two.

Q. Did the lamps you purchased have the label on them reading "Sunbeam"?

A. Yes, sir.

Q. I refer your attention to a table lamp sitting on the counsel table here in front of you. Is this one of the lamps you purchased from the defendant Sunbeam Furniture Corporation? [82]

A. Yes, sir.

Q. Was the label that you see attached on it, attached to it at the time you purchased it?

A. Yes, sir.

Mr. Pattishall: I am going to take that label off and ask it be marked for identification.

The Clerk: Plaintiff's Exhibit 7 marked for identification.

(Testimony of Ruth L. Wilson.)

(The label referred to was marked Plaintiff's Exhibit No. 7 for identification.)

By Mr. Pattishall:

Q. Miss Wilson, I show you Plaintiff's Exhibit 7 for identification, which is a tag or label bearing the word "Sunbeam," and ask you if that is the label which was on one of the lamps which you purchased from the defendant Sunbeam Furniture Corporation.      A. Yes, sir.

Q. What was the occasion of your making the purchase of Sunbeam lamps?

A. Mr. Conley asked us to purchase the Sunbeam lamp for him.

Q. Who is Mr. Conley?

A. Mr. Conley is with the Sunbeam Corporation.

Mr. Pattishall: Please mark this for identification as Plaintiff's Exhibit 8.

The Clerk: Plaintiff's Exhibit 8 marked for identification. [83]

(A sheaf of documents was marked Plaintiff's Exhibit No. 8 for identification.)

By Mr. Pattishall:

Q. Miss Wilson, I show you Plaintiff's Exhibit 8 for identification, which appears to be a sheaf of invoices, shipping orders, and so forth, stapled together, and ask if you will examine them, please.

(Witness complies.) [84]

Q. Referring to the sheaf of invoices, purchase

(Testimony of Ruth L. Wilson.)

orders, Plaintiff's Exhibit No. 8 for identification, Miss Wilson, would you tell me what you know about them, whether or not you recognize them?

A. Yes, sir; the purchase order is one that I wrote up, a copy of it, and the others are the bill and the shipping orders that we got when we received the lamp.

Q. Did you contact any salesman or were you contacted by any salesman in connection with this purchase?

A. Yes, a salesman came out and talked—brought the book, their catalogue, out and showed them to us, and we ordered from that.

Q. Who was that salesman, do you know?

A. I don't recall his name.

Q. What concern did he say he was from, if any?

A. Well, he wrote it down as Sunbeam Furniture, I believe it was Expert.

Q. He wrote Sunbeam Furniture Corporation on it? A. No. It was written on the order.

Mr. Pattishall: I offer Plaintiff's Exhibits 7 and 8, for identification, into evidence as Plaintiff's Exhibits 7 and 8.

The Court: All right.

The Clerk: Plaintiff's Exhibits 7 and 8 in evidence. [85]

(The documents, heretofore marked Plaintiff's Exhibits 7 and 8, were received in evidence.)

Q. (By Mr. Pattishall): Referring your atten-

(Testimony of Ruth L. Wilson.)

tion again to Plaintiff's Exhibit 8, would you examine the calling card, business card, attached in back, which says "Phil Ain Sunbeam Furniture Corporation"; was that left by this salesman that you spoke of?      A. Yes, sir.

Mr. Pattishall: That is all.

The Court: Cross-examine.

### Cross-Examination

By Mr. Beehler:

Q. Miss Wilson, I believe you stated that the store your father runs is an appliance store?

A. Yes, sir.

Q. You handle household furnishings in there generally?

A. It is electrical household wares.

Q. It is limited strictly to electrical household furniture?      A. Yes, sir.

Q. You don't handle any living room suites?

A. No, sir.

Q. No furniture of any kind?      A. No, sir.

Q. Before you purchased the lamp before us here, you never handled any decorative lamps of that kind either, did you?      A. No.

Q. And, in fact, as a purchasing agent, let me suggest, for your store, prior to the purchase of this lamp you had never purchased any lamps at all, had you?      A. No.

Q. When you purchased this lamp from the Sunbeam Furniture Corporation, you knew that that was not the Sunbeam Corporation of Chicago, didn't you?      A. Yes.

(Testimony of Ruth L. Wilson.)

Q. When you were asked by Mr. Condon—was that his name? A. Conley.

Q. (Continuing): —to purchase a Sunbeam lamp from the Sunbeam Furniture Corporation, you knew at the time that you were not buying a lamp from the Sunbeam Corporation, didn't you?

A. Yes, sir.

Q. Why did you purchase the lamp?

A. Mr. Conley asked if we would.

Q. Was that just because Mr. Conley asked you?

A. Yes, sir, that is all I knew.

Q. That was not the stock in your store, was it?

A. No, sir.

Q. Before you put that order in for a Sunbeam lamp, as appears on the exhibit, did you know or didn't you, that there were such things as Sunbeam lamps?

A. We had seen some advertisements on them.

Q. What advertisements did you see before you wrote out that order?

A. Well, there was a magazine article from a page in a magazine, and I believe we received some literature from the company.

Q. What magazine was that?

A. I don't recall offhand.

Q. When did you see it?

A. Some time ago.

Q. How long ago?

A. Prior to purchasing the lamp.

Q. I couldn't quite hear you.

A. Previously to purchasing the lamp.

(Testimony of Ruth L. Wilson.)

Q. Would you repeat it again, please? I can't hear you.

A. Previous to purchasing the lamp.

Q. A year ago, or five years ago, or a month ago? A. Within the last year.

Q. And you say you don't recall what magazine it was? A. No, I don't. [88]

Q. What magazines do you subscribe to?

A. Well, we get all the electrical magazines, and anything that pertains to our business.

Q. Did the Sunbeam advertisement appear in one of the electrical magazines?

A. I don't recall.

Q. What did that advertisement look like? Do you remember what it looked like?

A. It was a lamp advertisement, and it said, "Sunbeam Lamps."

Q. What kind of lamps were advertised?

A. Decorative and household lamps.

Q. Was the Sunbeam Furniture Company name used in connection with the ad? A. Yes, sir.

Q. Are you familiar with the name Expert Lamp Company? A. That was along with it.

Q. When you purchased this lamp did that have a tag on it with the name "Expert Lamp Company" on it?

A. I think that was down below on it. "Sunbeam" was the large letters, and then that was down below.

Q. Did that tag have the name "Sunbeam Furniture Corporation" on it, too?

(Testimony of Ruth L. Wilson.)

A. I don't know.

Q. Will you examine the tag and tell me whether that [89] is the tag you saw? A. Yes, sir.

Q. You don't find the name "Sunbeam Furniture Corporation" on there, do you?

A. No, sir.

Q. Did you personally, Miss Wilson, write out this purchase order No. 5516, which appears in Plaintiff's Exhibit No. 8? A. Yes, sir.

Q. What prompted you to order that lamp as a Sunbeam lamp?

A. Well, that is the way it was written up in the advertisement.

Q. Did you have the advertisement before you when you wrote that? A. Yes, sir.

Q. And that was an advertisement in what magazine? A. I don't recall the magazine.

Q. You wrote this order on October 20th of last year? A. Yes, sir.

Q. You don't remember that long ago?

A. There was a lot of business between that and now.

Q. How many lamps have you ordered since that time?

A. We ordered a pair, and then we picked up one, and then shortly after that we received two additional ones. [90]

Q. And are those all of the lamps that you ever ordered? A. Yes, sir.

Q. When the Sunbeam salesman came to your

(Testimony of Ruth L. Wilson.)

place of business, you knew that he represented the Sunbeam Furniture Corporation, didn't you?

A. Which salesman are you talking about?

The Court: You asked that question and she answered it. She ordered it purposely from him under that name.

Mr. Beehler: I don't recall, your Honor, that we talked about the salesman.

The Court: You knew you were ordering something not made by the Sunbeam Company who makes the Mixmaster and other things?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Beehler): When you ordered the Sunbeam lamp from the Sunbeam Furniture Corporation, you represented yourself, did you not, as a retail dealer?     A. Yes, sir.

Q. Not as an independent purchaser?

A. Yes, sir.

The Court: Did I understand you to say that the salesman called at your place of business?

The Witness: Yes, sir, he called. [91]

The Court: He knew the business you were in?

The Witness: Yes, sir.

Q. (By Mr. Beehler): Miss Wilson, do you still have in your store the magazine that you say you saw the advertisement in?

A. I don't recall offhand if I do or not.

Q. Is the magazine the only place that you saw the advertisement?     A. Yes, sir.

Q. Do you have any other literature that you

(Testimony of Ruth L. Wilson.)

saw the advertising of lamps distributed by the Sunbeam Furniture Corporation?

A. There was some, but I don't believe I have them.

Q. Will you, Miss Wilson, before court convenes in this case, produce the magazine in which you saw it, if you can find it?

The Court: If she has it.

The Witness: I have thrown out most of last year's magazines.

The Court: If you have it, turn it over to counsel before tomorrow or by tomorrow. If not, forget about it.

Mr. Beehler: That is all.

Mr. Pattishall: No redirect.

The Court: Step down. Call the next witness.

Mr. Pattishall: Miss Gibson. [92]

### MARY GIBSON

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Mary Gibson.

### Direct Examination

By Mr. Pattishall:

Q. Give me your full name, please, Miss Gibson.

A. Mary Gibson.

Q. Where do you live?

(Testimony of Mary Gibson.)

A. South Pasadena.

Q. Your street address, please?

A. 341 Hawthorne Street.

Q. What is your occupation?

A. An interviewer for Marketing Research Company.

Q. How long have you been engaged in that work? A. Approximately two years.

Q. What did you do prior to that?

A. I hadn't worked for some little time prior to that. I have done industrial X-raying and medical laboratory work. [93]

Q. Have you ever attempted to purchase the Sunbeam lamps? A. Yes, I have.

Q. Will you tell me about it, please?

A. Yes. I went with Mr. Robert Enfield up to the Sunset Home Furniture Company.

Q. Are you testifying from note?

A. Yes, I am. Is there any objection?

Q. Are they notes made at the time?

A. I made these notes as soon as I came out of the store.

Mr. Pattishall: Is there any objection?

Mr. Beehler: No. That is all right.

The Court: Go ahead.

The Witness: I went in with Bob Enfield to get a tag from a Sunbeam lamp they said they could order for us.

Q. (By Mr. Pattishall): Who is Mr. Enfield?

A. He is employed by Lampa and Christopher-son.

(Testimony of Mary Gibson.)

Q. What is their work?

A. Trade-mark research.

Q. Proceed.

A. We talked with Mr. Lane, and in talking to him, I told him that I had a Sunbeam Mixmaster—Sunbeam mixer, rather, and was curious to know if it was the same company that made the lamps. [94]

He said it was the same corporation, but a different division. They made all kinds of electrical appliances.

I asked him, "Is it the same company that makes the Sunbeam mixers?"

He said, "Yes."

Q. Will you give us the address of this place?

A. No, I cannot definitely. It is on Sunset Boulevard, out near Garner Junction. I imagine it is approximately in the 7300 block.

Q. Do you remember the name of the place?

A. Yes. Sunset Home Furniture Company.

Then we also went to the Kay's Department Store. I went in there by myself.

I asked to look at some—rather—I didn't ask to look at them. I looked around the store and saw some Sunbeam lamps and told the man I was interested in some figurine lamps.

Q. Did those lamps carry tags on them, similar to—

A. They carried a Sunbeam tag on them.

Q. Were the Sunbeam tags you refer to similar to Plaintiff's Exhibit 8, which I show you?

A. This one, you mean (indicating)?

(Testimony of Mary Gibson.)

Q. Yes. A. Yes, they were.

Q. Proceed.

A. I talked to Mr. Weinstein, who was a buyer in there. [95] I told him I had a Sunbeam toaster and wanted to know if it was the same company that made the lamps.

He said he didn't know, but it could be. That the Sunbeam put out a number of electrical appliances, mixers, shavers, and so forth. The lamps were made in Chicago, so that it may be.

At the time I told him I didn't want to make any definite decision, I would like to bring my room-mate back with me to look at them.

He said if I had looked at any ceramic figurines I would realize what a bargain I was getting. That he was a buyer and for that reason he knew a bargain when he saw one.

Mr. Pattishall: Thank you. That is all.

#### Cross-Examination

By Mr. Beehler:

Q. Mrs. Gibson, you stated, I believe, the lamps you saw had on them a tag like Plaintiff's Exhibit No. 7?

A. If by this, you mean this tag, yes (indicating).

Q. What made you think that the lamp you saw that tag on was distributed by the Sunbeam Furniture Corporation?

A. I don't recall saying that I thought it was distributed by them.

(Testimony of Mary Gibson.)

Q. You knew then it was not, is that correct?

A. I merely knew it said "Sunbeam lamp" on it.

Q. You did know, Mrs. Gibson, didn't you, that that [96] lamp was not distributed by the Sunbeam Furniture Corporation?

A. That it was not distributed by the Sunbeam Corporation?

Q. That it was not.

A. No, I did not know it was not distributed by them.

Q. Had you ever heard of the Sunbeam Furniture Corporation before you saw that lamp?

A. No, I had not.

Q. So you never knew there was such a corporation in existence? A. That is correct.

Q. Then it is true, is it not, that you do not tie nor connect in any way the lamp which you saw that tag on with Sunbeam Furniture Corporation? That is true, isn't it?

A. I merely connected it with a Sunbeam lamp.

Q. Will you tell me again, Mrs. Gibson, the name of the department store that you referred to in your direct testimony?

A. Yes, Kay's Department Store.

Q. How do you spell Kay's?

A. (Spelling) K-a-y-'-s.

Q. Had you ever been in that store before you went out on this survey? A. No, I had not.

Q. Had anyone in that store ever mentioned Sunbeam [97] Furniture Corporation to you?

A. No.

(Testimony of Mary Gibson.)

Q. Now, you mentioned, I believe, the Sunbeam Home Furniture Company. Is that the correct name of it? A. No, it is not.

Q. What is the correct name?

A. The Sunset Home Furniture Company.

Q. Do you know whether or not that has any connection whatsoever in any way with the Sunbeam Furniture Corporation?

A. I have no way of knowing.

Q. Did you say you saw a lamp at that company's premises? A. No, I did not.

Q. What did you see at the premises of the Sunset Home Furniture Company?

A. I didn't say I saw anything. I said I went in with Mr. Enfield to take a tag from a Sunbeam lamp they had told him they could order for us.

Q. Did you see one there?

A. I didn't look.

Q. You didn't see one then?

A. I didn't look.

The Court: She said she did not look.

Mr. Beehler: It is quite obvious she didn't see one then.

The Court: You are arguing. She is a researcher. Do [98] not argue. Do not argue with that kind of a witness. She is a trained witness.

Step down.

(Witness excused.)

Mr. Pattishall: Mrs. Brandenburg.

## ANNE BRANDENBURG

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Mrs. M. C.

## Direct Examination

By Mr. Pattishall:

Q. Will you give me your full name?

A. Anne Brandenburg.

Q. Mrs. M. C. Brandenburg?

A. That is right.

Q. Where do you live, Mrs. Brandenburg?

A. 143 South Adams Street, in Glendale.

Q. What is your occupation?

A. I am a housewife.

Q. Are you familiar with the trade-mark Sunbeam? A. Yes, sir.

Q. How long have you been familiar with that trade-mark?

A. Oh, I would say about 15 years. [99]

Q. When you see or hear the trademark Sunbeam, does it bring to your mind any particular concern?

A. Well, I have a number of Sunbeam appliances in my home, and when I see that I imagine they have all been made by the Sunbeam Company.

Q. Would you name some of those appliances for us and tell us what they are?

A. I have a mixer and a coffee master and an

(Testimony of Anne Brandenburg.)  
iron, and my husband has had two or three razors,  
Sunbeam razors.

The Court: Has he changed them with the  
change of style?

The Witness: That is right.

The Court: It is very expensive to change the  
style, too.

The Witness: He says the last is so much better  
than the first, he had to try it.

Q. (By Mr. Pattishall): Does the old one still  
run?

A. His father is using his old one.

Q. How long would you say you have known of  
Sunbeam products?

A. I think about 15 years.

Q. Those are the products you have just men-  
tioned?

A. Yes. I haven't had them that long, but I  
have known of them. In fact, a friend of mine  
bought a mixer for her sister one time for Christ-  
mas. I had it in my home shortly before Christmas,  
so she didn't take it home. I always thought I  
wanted a mixer like that. [100]

Q. Under what name have you known them for  
15 years. A. Sunbeam.

Q. Based upon your experience, will you tell us  
briefly what you think of Sunbeam products, as to  
their quality? A. I think they are very fine.

Mr. Pattishall: Thank you.

Mr. Beehler: No questions.

The Court: All right. Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Pattishall: Mrs. Hampshire.

### JESSIE HAMPSHIRE

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Jessie Hampshire.

### Direct Examination

By Mr. Pattishall:

Q. Will you give me your full name, please?

A. Jessie Hampshire.

Q. Miss or Mrs? A. Mrs. Charles E.

Q. Where do you live, Mrs. Hampshire?

A. 1465 Monte Vista, in Pasadena. [101]

Q. What is your occupation?

A. Housewife.

Q. Are you familiar with the trademark Sunbeam? A. Yes, I am.

Q. What does it mean to you?

A. Well, it means electrical products we have in our home, what I have, I suppose, in particular. I have a mixer and a waffle maker.

Q. How long has it had that meaning to you?

A. Oh, quite a number of years, because I have been in the market for one for that long, and so many people I have talked to told me to be sure and get that one, instead of something else.

(Testimony of Jessie Hampshire.)

Q. Have you ever noticed any advertising by that concern?      A. Beg pardon?

Q. Have you ever noticed any advertising by that concern?      A. By the Sunbeam?

Q. Yes, ma'am.

A. I have noticed the Sunbeam. You know, mixers and Sunbeam waffle makers, things like that.

Q. You have noticed advertising, advertising those articles?      A. Yes. [102]

Q. How many years would you say you have observed such advertising?

A. In the homes of my friends, probably around the last five or six years.

Q. You say in the homes of your friends?

A. Yes. I haven't had one too long, myself. When talking to friends over the last five or six years, you know, they have referred me to that particular brand, because they felt it was best. You talk about one—"Well, should I get a Hammond-Beach or a Sunbeam?" And they refer to Sunbeam.

Q. Based on your experience, what would you say as to the quality of Sunbeam merchandise?

A. I think it is wonderful.

Mr. Pattishall: Thank you.

Mr. Beehler: No cross-examination.

The Court: All right. Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Pattishall: Mrs. Fitzhugh.

Mr. Beehler: May I suggest, your Honor, that if the purpose of these witnesses is to prove that

(Testimony of Jessie Hampshire.)

Sunbeam products are good products, the defendants are willing to admit that.

The Court: That is only one part of the testimony. We will take that admission.

The object of this testimony is broader than that. It [103] is to say that the word "Sunbeam" spells the products of this company. If you are ready to admit that, we will take the admission.

Mr. Pattishall: Your Honor, I have about seven or eight more witnesses of the same character. Perhaps counsel would stipulate that the remaining witnesses will testify substantially the same as the first two. It might expedite matters.

Mr. Beehler: As Mrs. Brandenburg and Mrs. Hampshire?

Mr. Pattishall: Yes.

Mr. Beehler: I am willing to stipulate that.

The Court: Then let us have for the record the names of the witnesses.

### GLADYS FITZHUGH

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Mrs. James C. Fitzhugh.

### Direct Examination

By Mr. Pattishall:

Q. What is your first name?

A. Gladys.

(Testimony of Gladys Fitzhugh.)

Mr. Pattishall: Thank you, Mrs. Fitzhugh. You may step down.

The Court: All right.

(Witness excused.) [104]

The Court: Give the Clerk the names of the other witnesses.

Mr. Pattishall: Mrs. William Rhodes.

The Court: What is the given name?

Mrs. Rhodes: Audrey Eleanor Rhodes.

Mr. Pattishall: Where do you live?

Mrs. Rhodes: 79 North Craig, Pasadena.

Mr. Pattishall: Mr. M. C. Saunders.

Mr. Saunders: Yes.

Mr. Pattishall: Is that your correct name?

Mr. Saunders: Yes.

Mr. Pattishall: What is your address?

Mr. Saunders: 324 Monterey Road, South Pasadena.

Mr. Pattishall: Marshall Mercer.

Mr. Mercer: Yes.

Mr. Pattishall: Will you give your full name and address, please, sir?

Mr. Mercer: Marshall M. Mercer. 1526 East Windsor Road, Glendale, California.

Mr. Pattishall: Mr. Lovin. Will you give your name and address, please, sir?

Mr. Lovin: C. H. Lovin, 319½ East Chestnut, Glendale.

Mr. Pattishall: Mr. Nickelson.

Mr. Enfield: Mr. Nickelson isn't here. He is due to come in a little later. [105]

Mr. Pattishall: Do you have his name and address?

Mr. Enfield: Yes.

Mr. Pattishall: E. L. Nickelson.

Mr. Enfield: 2957 Francis Avenue, Los Angeles.

Mr. Pattishall: Mr. Enfield.

### ROBERT E. ENFIELD

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Robert E. Enfield.

Mr. Pattishall: I suppose these other ladies and gentlemen may be excused?

The Court: They may be excused.

### Direct Examination

By Mr. Pattishall:

Q. Will you give me your full name, please?

A. Robert E. Enfield.

Q. Where do you live, Mr. Enfield?

A. I live at 4934 North Damen Avenue, Chicago, Illinois.

Q. What is your occupation?

A. Trademark research.

Q. For how long have you been so employed?

A. For slightly over a year and a half.

Q. For what firm do you work?

(Testimony of Robert E. Enfield.)

A. For the firm of Lampa and Christophersen in Chicago.

Q. You have worked for them for a year and a half?     A. Yes. [107]

Q. What did you do before you went into that work?

A. I was a student at the University of Iowa just before being employed by them, and before that I was an officer in the United States Army, in the Air Force.

Q. Were you a pilot?     A. Yes.

Q. Where were you a student?

A. In the University of Iowa.

Q. What subject did you major in?

A. I majored in psychology and did a lot of my work in the measurement of public opinion, in the theory behind it.

Q. Did you obtain your degree in that field?

A. Yes.

Q. A bachelor's degree, of course?

A. Yes.

Q. Have you ever bought any Sunbeam lamps in the Los Angeles area? By that I mean lamps that have the word "Sunbeam" on them treated as a trademark?     A. Yes.

Q. Will you tell me about it, please?

A. I went to a furniture store down on South Broadway called the Vander Furniture Mart, and I had a conversation with the sales person there, and finally he agreed to call the Sunbeam Furniture Corporation showroom and tell them that I was

(Testimony of Robert E. Enfield.)

coming in to look at some merchandise as a consumer, [108] and I went to the Sunbeam Furniture Corporation showroom and I picked out and purchased a table lamp bearing two tags, both tags stating "This is a genuine Sunbeam lamp." I paid for the lamp in cash and carried it out of the store room myself. They placed it in a furniture packing box for me.

Q. Does Plaintiff's Exhibit No. 1 correspond to that lamp? In other words, is that a photograph of the lamp that you mention?

A. This is a photograph of the lamp I purchased and carried out.

Q. Did you have that photograph made yourself? A. Yes.

The Clerk: Plaintiff's Exhibit 9 marked for identification.

(The documents referred to were marked Plaintiff's Exhibit No. 9, for identification.)

Q. (By Mr. Pattishall): Mr. Enfield, I show you what appears to be an invoice and a shipping order. On the invoice, the top part reads "Sunbeam Furniture Corporation," the shipping order reads the same, Plaintiff's Exhibit 9, for identification, and ask you to examine it, please, tell me what it is.

A. That is the original order made out in the Sunbeam Furniture Corporation show room for the lamp that I purchased, [109] and the invoice was typed up at the same time and was given to me as a receipt. I signed the invoice at the time I picked up the lamp.

(Testimony of Robert E. Enfield.)

Q. When you say the lamp, you are referring to a lamp that is pictured in Plaintiff's Exhibit 1?

A. I am referring to this particular lamp, yes.

Q. Mr. Enfield, have you ever done any consumer reaction test research in connection with the word "Sunbeam"?      A. Yes.

Q. Tell me what your assignment was, who gave you the assignment, and what you did to carry it out, please, as briefly as possible?

A. I was sent a survey sheet from Chicago, from the office of Lampa and Christophersen, and I was instructed to run a public opinion survey or consumer reaction test survey, and I used a picture of the lamp, the same lamp that I had purchased in the ware rooms as a part of the survey. I went to the University of Southern California, to the employment service, and requested that I be allowed to interview five or six reliable girls who could help with this reaction test. I interviewed the girls and picked out three to do the actual interviewing for me. The girls were told nothing about the purpose of the survey and, in fact, they were instructed not to divulge any information to any of the people at all if they could possibly help it. In other words, I told them we were [110] interested in getting exactly what the public's reaction was, and therefore if they knew nothing about it they would be much more apt to give us a true picture instead of unconsciously weighting it one way or the other.

Q. Did they know anything about this action?

A. Absolutely nothing about the action. They

(Testimony of Robert E. Enfield.)

didn't know actually who they were representing or anything about it. Some of them might have been able to surmise something from the questionnaires, but I told them definitely we wanted to have them do the work without knowing the purpose of it or the reason.

Q. Did you give them any written instructions?

A. I gave them each a sheet of written instructions just before we started the survey, instructed them to read it over thoroughly, sign it and date it, and keep it with them at all times, and if anything came up relevant to the interviewing of the public, to refer to the sheet of instructions to clear it up. The girls did this, read them over and signed them, and maintained them until the end of the survey, at which time they returned them to me.

The Clerk: Plaintiff's Exhibit 10 marked for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 10, for identification.)

Q. (By Mr. Pattishall): Mr. Enfield, I show you what [111] appears to be a test sheet in blank marked Plaintiff's Exhibit No. 10 for identification. Will you look at it, please? What is it?

A. This is the interview sheet that we used to interview the public, get the reaction tests.

Q. Is that identical to the sheets that you used?

A. Yes.

Q. And which you supplied the girls that you mentioned?

A. Yes. The only difference is this one is not

(Testimony of Robert E. Enfield.)

numbered. The ones that we used for the reaction test were numbered consecutively.

Q. Will you proceed with your story as to what you did?

A. I did just as I was instructed. I hired the girls and I took them out to the area in my automobile and placed them personally on the streets that we had picked out to survey. My instructions called for middle class neighborhoods, so I attempted to get as near middle class as possible. I was aided in this by the employment service at the University of Southern California, as they have a research department that handled these sort of things, and they know the Los Angeles area. They gave me the middle class area to work on.

The Court: You had better not let Mr. Gabrielson hear you use that word "middle class." He says it is a socialistic [112] phrase.

The Witness: That is for want of a better word.

Q. (By Mr. Pattishall): You mean middle income? A. Yes, middle income.

The Court: You will be classified as a Red before you know it. You are young, you will lay yourself open. A university man using that word, it sounds like Marxism. You had better be careful.

Q. (By Mr. Pattishall): Tell me what you did and what you instructed the girls to do, and what the results of your research were.

A. I instructed the girls to follow the written interview sheets, and I personally placed each one on a street, and from time to time I made the rounds and would watch the girls doing the interviewing,

(Testimony of Robert E. Enfield.)

and in the evening of the first day I picked up the interview sheets, and the second day we went to another middle income area and proceeded.

Q. Give me some more-accurate location on these areas that you used.

A. The area in south Los Angeles was in the Crenshaw district, and on 10th and 11th and 12th Avenue in that area; and in the northern area it was Wilshire to Melrose and Highland to Fairfax. And I extended the instructions verbally to include Fairfax, as it had a shopping area that we wanted to catch the shoppers in the afternoon. The girls followed the [113] instructions very well.

Q. How did you know?

A. I, from time to time, went around and observed them and listened to their conversations. From the questions that they asked me they seemed to be trying to do a very good job. I think they did. I tabulated the results, and the results of these surveys indicated that 56.3 per cent of the population indicated confusion between the Sunbeam lamp in the picture and the Sunbeam Corporation products.

Q. When you say "indicated confusion," how do you arrive at that?

A. On the questionnaire there was absolutely no mention of the Sunbeam Corporation or any of its products.

Q. What are the pertinent parts of the questionnaire?

A. The questionnaire reads, "Have you ever bought or seen a lamp bearing the name Sunbeam?" and if the recipient marked "Bought," "Approxi-

(Testimony of Robert E. Enfield.)

mately when?" and the answers could be "Within the past year" "Within the past two years" "More than two years." And the key question, "Do you know whether the company that makes this lamp makes any other product or products?" Nowhere on here is the Sunbeam Corporation or its products mentioned to give the recipient a clew. Yet 56.3 per cent of the population interviewed did list Sunbeam Corporation products, indicating that they were confusing and [114] associating the two products together.

Q. At the time these interviews were made each person interviewed was shown a photograph corresponding and identical to the one seen in Plaintiff's Exhibit No. 1? A. That is correct.

Q. What was the total number of interviews?

A. 261.

The Court: Did you tabulate them yourself?

The Witness: Yes.

The Court: And made the percentages?

The Witness: Yes.

The Clerk: Plaintiff's Exhibit 11 marked for identification; Plaintiff's Exhibit 12 marked for identification; Plaintiff's Exhibit 13 marked for identification.

(The books referred to were marked as Plaintiff's Exhibit Nos. 11, 12, and 13 for identification.)

Q. (By Mr. Pattishall): Will you examine these books marked for identification as Plaintiff's Exhibits 11, 12 and 13, Mr. Enfield? What are they?

(Testimony of Robert E. Enfield.)

A. These are the looseleaf books supplied by me to the three girls that did the actual interviewing, and they contain the interview sheets used, and also the actual photograph used in the survey.

Q. Have there been any alterations or removals or changes in any manner whatsoever to Plaintiff's Exhibits 11, [115] 12 and 13 for identification?

A. None.

Q. How do you know?

A. I just looked through them, and I had been through them just before I came on the stand. [116]

Q. In whose possession were they from the time that they were made?

A. They have been in my possession from the time they were made.

Q. Have you tabulated the results?

A. Yes.

Mr. Pattishall: I offer Plaintiff's Exhibits 11, 12 and 13, for identification, into evidence as Plaintiff's Exhibits 11, 12 and 13.

The Court: They may be received.

The Clerk: Plaintiff's Exhibits 11, 12 and 13 in evidence.

(The documents heretofore marked for identification Plaintiff's Exhibits 11, 12 and 13, were received in evidence.)

Q. (By Mr. Pattishall): What sort of code did you use to tabulate them?

A. I would start off on question No. 1, and if the person had bought the lamp I marked a "B" on the right-hand margin in ink; if they had seen

(Testimony of Robert E. Enfield.)

it, I marked a "S"; if they had not seen it, I marked a "N"; and if they did not know, I marked a "D." And in question No. 2, if the person listed a Sunbeam Corporation product, such as the Mixmaster or the toaster, any of the Sunbeam line, I would tabulate that as Confused. In other words, some would be "No, they [117] hadn't seen the lamp," but they would confuse the two. And in the third question I marked under "How much shopping do you do for your household," if they did most of it I marked it with an "M," half of it I marked with a "H," and a little I marked with a "L," and none I marked with an "N."

Q. Leaf through that book that you have in your hand, which is Plaintiff's Exhibit what?

A. 11.

Q. Leaf through it quickly and read to me some of those which you did not count as confusion.

A. I have one here that did not claim to have ever seen the lamp, so it is marked "No," and did not know whether this company that makes the lamp made any other product or products, and it was marked "No"; and that was marked for "Not confused." Another one had not bought—

Q. What number was that page?

A. 171. Another one had not bought or seen a lamp bearing the trade-mark "Sunbeam" was marked "No" for not having seen it; and under the second question they checked "Don't know" as the answer to "Do you know whether the company that makes this lamp makes any other product or products" and I tabulated that as Indefinite. That was

(Testimony of Robert E. Enfield.)

not included in the confused tabulation. That was No. 163.

No. 127 answered "No," they had not bought or seen a lamp [118] bearing the name "Sunbeam," they answered "No," and they did not know whether the company made any other products, so that was tabulated under the indefinite or not confused.

No. 109, the first question was answered by "No" whether they had not seen or bought a lamp bearing the trade-mark "Sunbeam" and the second question they did not know any other products made by the same company, and it was marked not confused and tabulated as such.

No. 107, they had not bought a lamp bearing the trade-mark "Sunbeam" so that that was marked "No, they had not seen it," and under the second question they did list a product "Globes," which could mean most anything, I guess, and that was tabulated as not confused, because we didn't know definitely that it was a Sunbeam product that they were thinking of.

Mr. Pattishall: Thank you, sir, that is all.

The Court: Cross-examine.

#### Cross-Examination

By Mr. Beehler:

Q. Mr. Enfield, you said here that you purchased a lamp from the Sunbeam Furniture Corporation. How did you get into the showroom of the Sunbeam Furniture Corporation?

(Testimony of Robert E. Enfield.)

A. I walked into Vander Furniture Mart on South Broadway and asked him if he carried Sunbeam lamps. He said he didn't, but that he could get one for me, and I asked him [119] how soon he could get one, and he said he could send me right direct to the Sunbeam Furniture Corporation ware room and I could pick one up there. He gave me his card and he called and said I was coming, and I went in.

Q. When you got to the Sunbeam Furniture Corporation's place of business, you had to show this card, didn't you?      A. Yes.

Q. Otherwise they would not have let you in, wasn't that your instruction?

A. I didn't try it otherwise. I don't know whether I could have gotten in without the card or not.

Q. You don't know whether you as a private individual could have gotten into the show room, is that correct?      A. No, I don't.

Q. The lamp which you allegedly purchased, when it was invoiced, was not invoiced to you, was it?      A. Do you mean consigned to?

Q. The invoice was consigned to the furniture company?      A. To **Vander Furniture Mart**.

Q. Not to you?

A. It was marked on here "Paid and picked up by R. E. Enfield," and signed by me. It was not consigned to me.

Q. Did you ask that it be consigned to you?

A. No, I didn't.

(Testimony of Robert E. Enfield.)

Q. When you were at the show room were there any other [120] persons other than the employees around the place in the show room?

A. Yes, there was a family of, I think, four people came in and were looking at some maple furniture.

Q. Were they retailers?

A. No, because they were asking a good many questions, and it was obvious that ~~we~~ were purchasing something for their own personal use.

Q. What were their names?

A. I didn't ask them their names.

Q. Where were they from?

A. I have no idea.

Q. At the Sunbeam Furniture show rooms did you see any electrical appliances other than decorative lamps? A. No.

Q. You knew when you were in the Sunbeam show rooms that you were not in any premises connected with the Sunbeam Corporation?

A. Yes.

Q. There was no doubt whatever in your mind?

A. None.

Q. With respect to the survey that you made, you stated, I believe, that you showed these girls who were making the survey a picture?

A. That's correct. [121]

Q. Did you show them the lamp that that was a picture of? A. No.

Q. Did you show them the label that that lamp carried?

(Testimony of Robert E. Enfield.)

A. No, other than to point it out on the shade. It is very obvious in the picture.

Q. Did you point out to them that that label bore the name of the manufacturer, Expert Lamp Company?

A. I didn't point it out to them. I didn't point out the label at all to them. It was simply there for them to observe for themselves.

Q. Of all the people that answered the questionnaire on the survey, did any of them see anything other than the photograph? A. No.

Q. Was the label pointed out to any of them?

A. No.

Q. Was their attention called to the fact that there was a label on the lamp, any of them?

A. Not to my knowledge, no; they simply said "I show you a picture of a table lamp."

Q. Why did you pick college girls for your survey?

A. I was told to get three reliable girls, and I thought a college would be the most likely place to find three reliable girls. [122]

The Court: Besides, they can use the money.

Q. (By Mr. Beehler): Why did you pick the so-called middle-income bracket neighborhoods?

A. I was instructed to do so.

The Court: Mr. Roper uses nothing but college men and college girls to make these surveys. I happen to know, because my own daughter made some of them while she was attending U.C.L.A.

Q. (By Mr. Beehler): Why did you pick that particular lamp?

(Testimony of Robert E. Enfield.)

A. I would imagine the same reason any person would buy the lamp. I just like the looks of it.

Q. Why did you settle on just one lamp? Why didn't you pick 15 different lamps?

A. I intended to carry it out of there myself. I didn't think I could take 15.

Q. Were you ever in a lamp store?

A. Yes.

Q. Were you ever in any one of these downtown department stores where they have lamp departments? A. Yes.

Q. Which one?

A. I have been in the Broadway, the May Company.

Q. Can you give any guess as to how many different kinds of lamps they have in that lamp department in the [123] Broadway?

A. I couldn't venture a guess.

Q. Wouldn't you say there were at least 300?

A. I wouldn't know. I didn't have any occasion to look at the number.

Q. As a matter of fact, in that whole lamp department there were hardly more than 5 lamps the same, were there? A. Probably not.

Q. Do you have any idea in that lamp department, just taking it by way of example, how many different manufacturers of lamps are represented there?

A. There are probably a good many different ones.

Q. When you walked in there, did you investigate any of those lamps for trade-marks?

(Testimony of Robert E. Enfield.)

A. Yes.

Q. How many of the lamps involved did you find trademarks applied to?

A. It is a very difficult question. I didn't count them specifically. I did see a lot of names that I recognized.

Q. When you went in there you went in there in your capacity as a trade-mark investigator, didn't you?      A. Yes.

Q. You were definitely interested in trade-marks as a business, weren't you?      A. Yes. [124]

Q. As a matter of fact, most of the lamps you saw in there didn't have any trademark on them, did they?

A. Well, I wouldn't say that. I saw a good many that carried the name of Dena and a good many Rembrandts.

Q. You did see an awful lot of them that didn't?

A. A good many of them didn't have tags on them.

Q. All they had on them was the Broadway price tag?      A. Yes.

Q. Did you see any lamps in there that were labeled Sunbeam lamps?      A. No.

Q. Did you ever anywhere in any furniture store see a Sunbeam lamp for sale?      A. Yes.

Q. Where?

A. At the Globe Furniture Company on Washington Street, about 1500.

Q. When you saw that lamp at the Globe Furni-

(Testimony of Robert E. Enfield.)

ture Store, were you led to think that was made by the Sunbeam Corporation?

A. No, I definitely knew it was made by the Expert Lamp Company.

Q. Was there anything about the label or that lamp itself to suggest it might have been distributed by the Sunbeam Furniture Corporation? [125]

A. No.

Q. Now, directing your attention to your survey sheet, Plaintiff's Exhibit 10, you said, I believe, that the tabulation of your item No. 2(b) indicated there, that is, you deduced from that answer that there were about 56.3 per cent persons confused, is that right?

A. 56.3 persons who indicated they were confused by their answers.

Q. By their answers? A. Yes.

Q. Among those 56.3 per cent, how many of them said they did no purchasing for the household?

A. I didn't break it down under that category.

Q. Isn't it true then that although 56.3 per cent might have been listed as confused, they never purchased a lamp in their lives for the household, and that would make your survey mean nothing, wouldn't it?

A. If we can conceive of a situation like that, it would.

The Court: They were not asked if they ever purchased a lamp? Was that one of the questions?

(Testimony of Robert E. Enfield.)

The Witness: That was one of the questions, yes.

The Court: I did not see that.

Q. (By Mr. Beehler): Now, you called our attention to a survey made for one specific lamp, Plaintiff's Exhibit 1. [126] Did you make any survey, general survey for such items as living room furniture? A. No.

Q. Did you make any general survey for such items as kitchen furniture? A. No.

Q. Did you make any general survey for dining room furniture? A. No.

Q. Any survey for occasional furniture?

A. No.

Q. Any survey for hassocks? A. No.

Q. Crockery, dishes? A. No.

Q. Mr. Enfield, have you had other survey experience prior to this one? A. Yes.

Q. You feel yourself well qualified to judge the results of your surveys? A. Yes.

Q. Do you not feel, Mr. Enfield, had you shown these individual people, to whom you presented the questionnaires, the lamp itself with the label hanging on it, that label that we have here in evidence showing the Expert Lamp Company name, do [127] you not think the answers of most of those people would have been different?

A. You are asking for an opinion on that?

Q. Yes.

The Court: Yes.

(Testimony of Robert E. Enfield.)

The Witness: I think it would be almost exactly the same.

Q. (By Mr. Beehler): You think that if they saw the label with the name Expert Lamp Company on it, they would still think that that was made by the Sunbeam Corporation? Is that the way I interpret your answer?

A. The average person would have no way of knowing one way or the other, since they do not know generally the corporate name of any of the manufacturers of named products.

The Court: It is quite obvious on these labels that the words "Expert Lamp Company" are below the mark. The mark is in bold type, both on the large label and on the small label. As the French say, saute aux yeux, meaning to strike you in the face, whereas the other one is a little one. You have to look closely to see it on either label.

Anyone looking at this would be struck immediately by the gold marker of Sunbeam. A person would have to look below that and very closely to see the name Expert Lamp Company.

On the small label it is so small that I doubt if a person who was not looking for it would ever see it. [128]

We are in the realm of speculation. I do not object to the answer. I am giving what to me is an obvious answer, which is a visual answer.

Q. (By Mr. Beehler): Have you yourself, Mr. Enfield, ever purchased decorative lamps for your own home?

(Testimony of Robert E. Enfield.)

A. Not for my own personal use, no.

Q. Have you ever purchased them as a buyer of lamps for any person at all?

A. None other than this particular lamp.

Q. None other than for this particular business survey? A. That is right.

Mr. Beehler: No more questions.

The Court: All right. Is there any redirect examination?

Mr. Pattishall: Yes. One or two questions. Please mark this for identification.

The Clerk: Plaintiff's Exhibit 14 marked for identification.

(The article referred to was marked Plaintiff's Exhibit No. 14 for identification.)

#### Redirect Examination

By Mr. Pattishall:

Q. Mr. Enfield, I refer your attention to a lamp sitting on the counsel table, the globe of which was just [129] broken. Is that the lamp that was used for the subject of the photograph which was used in the consumer test you testified to that we see in Exhibits 1, 11, 12, and 13?

A. Yes, sir, that is the same lamp.

Q. I show you another photograph marked Plaintiff's Exhibit No. 14 and ask you what it is, if you know.

A. This is a photograph of the window display

(Testimony of Robert E. Enfield.)

of the Globe Furniture Company on Washington, displaying these Sunbeam lamps in the window.

Q. Did they have the tags on them when you saw them?

A. Yes, they had the tags on them, and all of the tags were facing the window, so the street traffic could observe them.

Q. When did you last see them?

A. I think it was Thursday, but I am not sure. It was one day this week.

Q. This last week? A. Or last week.

Q. Did you have this photograph made (indicating)?

A. We called a photographer and had him go out—

Q. You say "we." What do you mean?

A. Mr. Christophersen and I called a photographer and had him go out and make it.

Q. Does this correspond to the window display you yourself saw (indicating)? [130] A. Yes.

Mr. Pattishall: I offer Plaintiff's Exhibit 14 in evidence as Plaintiff's Exhibit 14.

The Court: All right.

The Clerk: Plaintiff's Exhibit 14 in evidence.

(The article referred to was marked Plaintiff's Exhibit No. 14 and was received in evidence.)

Q. (By Mr. Pattishall): Mr. Enfield, will you break down and supply tomorrow morning in this court percentages concerning the don't-know persons? A. Yes.

(Testimony of Robert E. Enfield.)

Q. I don't mean "don't know." I mean no purchases. A. Yes. Question No. 3.

The Court: I don't think it would be very revealing to me. I will tell you why. In going over the three books I notice that many of the persons who answer do not know or did not buy.

Mr. Pattishall: You think it speaks for itself?

The Court: Yes. If you broke it down you would have to make a very extensive breakdown. For instance, I notice some persons who say, "I never bought one," and then they will answer, nevertheless, and say they associated the product with Sunbeam. What category would you put them in? You would have to have too many rudiments.

The Witness: It would take an extensive breakdown. [131]

The Court: Unless for some reason you want it, I do not think—

Mr. Pattishall: I thought it might clear up the question.

The Court: I do not think it will clear up the question in counsel's mind. You can analyze it. They are right here. Each of those books have the 50 sheets. I can run through them. They are in the record. I can draw my own inferences.

Mr. Pattishall: Yes, sir.

The Court: I know some of them are answered very thoroughly and then the people refused to sign. They were on guard.

Mr. Pattishall: That is one point I would like to bring out.

(Testimony of Robert E. Enfield.)

Q. (By Mr. Pattishall): Mr. Enfield, did you instruct your interviewers to try to have the interviewees fill out the sheets themselves and get them to sign them?

A. Yes. That was the instruction.

Q. What was your experience or, rather, their experience in that connection?

A. Their experience was it was extremely difficult to get the people to fill out the questionnaires themselves. They run into the problem of finding people that had their hands full or were in some way tied up, and some of them didn't [132] want to make the effort to pick up a pencil and sign it.

The Court: In those cases I notice the interviewer marked "Filled out for respondent," or something like that.

The Witness: Yes. They were instructed to do that, and also to show the respondent the interview sheet and have them clear up any questions they may have had before the interview was ceased.

The Court: I am using that word, as you use it, "respondent." It is a very unusual twist to a word used among lawyers that have been using it for many hundreds of years. You call a man a respondent, an interviewee or respondent, the one that is interviewed. I guess, though, any man that responds would be a respondent.

Q. (By Mr. Pattishall): What instructions did you give to the photographer who made the photograph in Plaintiff's Exhibit 1, and also seen on the

(Testimony of Robert E. Enfield.)

covers of each of the three books, Exhibits 11, 12, and 13?

A. My instructions were that he was taking a picture to be used in a response test, and for him to pay particular attention to the label. I wanted it so that the label and the very fine print on the label could be read in the photograph. The photographer complied with this and took great pains to get it in a very sharp focus.

He also told me that he took it with a white light, without the use of a filter of any kind to change any of the [133] details.

Mr. Pattishall: That is this Exhibit 1, which also appears in the books.

The Court: All right.

Q. (By Mr. Pattishall): When you visited the Sunbeam Furniture Corporation display rooms, did you count the number of lamps which bore tags having Sunbeam on them on their floor?

A. Yes, sir.

Q. How many were there?

A. I counted 49 lamps bearing the Sunbeam tag and there were no lamps of any other description.

Mr. Pattishall: That is all.

#### Recross-Examination

By Mr. Beehler:

Q. Mr. Enfield, do you see all right without your glasses? A. Yes.

(Testimony of Robert E. Enfield.)

Q. I show you this lamp which we have introduced as the subject matter of your Exhibit No. 1, and I point the label toward you and ask you from where you sit—and to note for the record that the reporter is between you and me—can you read from there the name “Expert Lamp Company”?

A. Yes.

Mr. Beehler: That is all. [134]

The Court: That is on the label on the shade. Can you read it on the small label below, on the standard? Mr. Beehler: It isn’t there.

The Witness: Since the globe has been broken, it doesn’t hang down.

Mr. Pattishall: Here it is.

The Witness: No, I can’t.

Mr. Beehler: Standing in the same position I was before, can you read it on the label of the lamp itself? The Witness: No.

Mr. Pattishall: The two labels are precisely identical in coloring and shape, are they not?

The Witness: Yes, in color and shape. But there is a difference in the lettering.

Mr. Beehler: And the lamp is never sold without the shade, either, is it?

The Witness: No.

Mr. Beehler: That is all.

The Court: All right.

(Witness excused.)

The Court: Mr. Beehler, I did not mean to intimate by my question it was not visible, but it

(Testimony of Robert E. Enfield.)

was that the field of vision would be taken by the splurge of Sunbeam itself. Unless you look especially to see the marking below, it would not be noticeable. I did not say it could not be seen. [135]

Mr. Beehler: I appreciate that. A part of our case is that we contend there is not a confusion of origin, because there is no mistaking the identity of the origin of anything that we sell, where any one takes occasion to examine it in the light of circumstances.

The Court: I know what your theory is, but your practice is that you have a sun dial there, a big circular sign with a fancy L running through it. You have a circle there, about three inches by three inches. And right below in a small space, in a third of an inch space, you have in small type an identification. That is always the element, the visual element, which is very important in all these cases.

I remember years ago of a famous German trademark case. Heinrich-Frank-Sohne was a famous German trademark on a product that you do not see in this country, except in the South. It is chicory. That product is used all over Europe. It comes in a wooden box. They have a big label with Heinrich-Frank-Sohne on it.

One of the greatest infringement cases was in eastern Europe, where they relied on the fact that people did not understand the German language and they used three German words, Hoch, Feinste, Sort, meaning the highest quality. Imagine a Rumanian peasant knowing the difference between the

(Testimony of Robert E. Enfield.)

two, even if he could read the words. It shows how the pattern follows. [136]

A case I like to refer to is one up in my own home town, Modesto Creamery case. That was the case of Modesto Creamery vs. Stanislaus Creamery Company. The Stanislaus Creamery Company came in and tried to bank on the name that the Modesto Creamery had established, in the manufacture of butter. They called it Modesto butter. People that looked at the words on the package did not miss the word "Creamery." What they were impressed with was the word "Modesto." In all these trademarks all over the world, the visual effect is of absolute importance. You can practice deception on it, merely by the manner in which you arrange your lettering on a piece of advertising. That is why I was calling attention to the difference between the size of the letters in which the words "Expert Lamp Company" appear, and the size of the letters on both labels on which the word "Sunbeam" appears.

Before you call another witness, we will have a short recess.

(Short recess taken.)

Mr. Pattishall: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 15 marked for identification.

(The article referred to was marked Plaintiff's Exhibit No. 15 for identification.)

Mr. Pattishall: Miss Trotman. [137]

JUNE LOUISE TROTMAN

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: June Louise Trotman.

Mr. Pattishall: I have a couple of advertising sheets, your Honor, which read "Sunbeam Furniture Corporation, send them to Sunbeam," to which is clipped an identification card for use in sending retail customers to the Sunbeam show room, apparently to view and select merchandise.

Mr. Beehler here has agreed to stipulate these pieces are put out by the defendant Sunbeam Furniture Corporation.

Is that correct?

Mr. Beehler: That is correct.

Mr. Pattishall: I offer Plaintiff's Exhibit 15 for identification, which I have just described, into evidence as Plaintiff's Exhibit No. 15.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(The documents referred to were marked Plaintiff's Exhibit No. 15 and were received in evidence.)

(Testimony of June Louise Trotman)

## Direct Examination

By Mr. Pattishall:

Q. Would you give me your full name, please?

A. June Louise Trotman.

Q. Where do you live, Miss Trotman?

A. 705 West 30th Street, Los Angeles.

Q. What is your occupation?

A. I am a student.

Q. Where are you a student?

A. At the University of Southern California.

Q. What year are you in at Southern Cal.?

A. Junior.

Q. What field are you studying?

A. Psychology and physics.

Q. What do you expect to take your degree in?

A. Either psychology or physics.

Q. Did you ever do any trademark research involving the word Sunbeam? A. Yes, I did.

Q. When was that?

A. The 7th and 8th of February.

Q. Where? A. In the Los Angeles area.

Q. Will you tell me, in your own words, what you did, please, briefly, what your instructions were? In other words, start at the beginning and tell me all about it.

A. I was hired by Mr. Enfield through the University of Southern California, to make a research survey. [139]

Q. Excuse me. When you said the 7th and 8th of February, is that this year, 1950?

(Testimony of June Louise Trotman)

A. This year, yes, sir. He gave us a set of instructions which we were to read and sign our names to, along with the date. That was the 7th. Then he took me to an area in Los Angeles and gave me 100 sheets of paper with questions on them and told me to ask—first, I was to show a picture of a lamp that was introduced a little bit ago, and to ask the people the three questions and have them fill it out, and to sign their name and address at the bottom.

Q. You say he supplied you with some material?

A. That is correct.

Q. I hand you Plaintiff's Exhibits 11, 12 and 13, and ask you to pick out the book that was supplied to you, if you can.

A. This one is mine (indicating). [140]

Q. Which one is that? Will you look at the number, please?

A. No. 13. He told us to show the picture first to the people and then to ask them these questions, have them filled out and sign their names.

Q. Are you referring to the sheets in the book?

A. The sheets in the book, yes, sir.

Q. Will you go on and tell me the story, please?

A. Well, I did as I was told. I asked the people the questions, and when they declined to sign their own name to it, I asked them to look it over carefully, see that I had filled in where they had indicated, and then I signed their name and affixed my initials to the side of that as it was filled out and

(Testimony of June Louise Trotman)

signed by me. Most of the time I could get them to sign it, but once in a while they didn't care to.

Q. Have you examined that book, your book, Plaintiff's Exhibit 13, today?

A. I did when I came in the court room, yes, I did.

Q. Did you examine it carefully enough to observe whether or not there were any alterations or removals? A. There has been none.

Q. What did you do with the books when you finished them?

A. I turned them in to Mr. Enfield.

Q. I mean the book. [141] A. This book.

Q. Yes, I mean "book" rather than "books."

A. I gave it to Mr. Enfield.

Q. What areas did you work in?

A. We worked in the areas stipulated here in the instruction sheets. Did you want me to read those?

Q. Just tell me generally what areas you worked in.

A. From Wilshire to Melrose, Highland to La-Brea, and Vernon to Slauson, Arlington to Fairfax.

Q. Did you know anything about this case or whom you were working for other than Mr. Enfield until you came to court today?

A. I didn't know anything until I came to court today about this case.

Q. When I talked to you yesterday, did I tell you anything about this case? A. No.

Q. Or rehearse your testimony which you have given here today? A. No, nothing.

(Testimony of June Louise Trotman)

The Court: The only notations that have been placed upon those sheets since they left your possession are those capital letters placed on the side of each by Mr. Enfield?

The Witness: The ones in ink?

The Court: Yes. [142]

The Witness: Yes, they were placed there since I returned the book.

Q. (By Mr. Pattishall): Other than that, that is the only alteration? A. That's all.

Mr. Pattishall: That is all.

The Court: All right.

#### Cross-Examination

By Mr. Beehler:

Q. Miss Trotman, when you made this survey, you defined the areas that you surveyed through, did you ring doorbells, did you call on residences, was that the way you did it?

A. That was part of it.

Q. How else did you pick the individuals that you questioned?

A. After we completed ringing doorbells we went to street corners, and I approached everyone I possibly could. As soon as I finished one sheet and put it underneath the sheet I had just finished, why, then, I asked the next person that came along. I didn't pick out any special people.

(Testimony of June Louise Trotman)

Q. Were there many who refused to give you answers at all?

A. I would say about three refused altogether.

Q. That is three out of—

A. They were in a hurry. [143]

Q. Three out of all of those that you asked?

A. Yes.

Q. And those three were three that you hailed on the street, were they?

A. About three on the street and about an equal number from door to door.

Q. I notice as I thumb through these pages, Miss Trotman, that almost every one appears to be a woman. Did you especially hail the women?

A. No, I didn't especially. Usually women came to the door. It was during the day hours, after 8:00 in the morning.

Q. Without my looking through here, do you remember about how many men you might have questioned?

A. Well, I could guess. It would be about five.

Q. Five out of how many? A. 100.

Q. Did you, Miss Trotman, make out one of these yourself before you started the survey?

A. Did I make one out?

Q. Yes.

A. Do you mean put my name and address down there at the bottom?

Q. Did you go through the questions and test yourself on the answers? [144] A. No.

(Testimony of June Louise Trotman)

Q. Do you mind if I ask you these questions?

A. I don't mind.

Q. Have you ever bought or seen a lamp bearing the name "Sunbeam"?

A. I have seen a picture of one.

Q. That was the picture at the survey?

A. Yes.

Q. That is the only one?

A. That is the only one.

Q. Do you know whether the company that makes the lamp makes any other product or products?

A. I don't, no.

Q. How much shopping do you do for your own household? A. All of it.

Q. Did you ever buy decorative lamps?

A. I have never bought a lamp.

Mr. Beehler: That is all.

Mr. Pattishall: No redirect.

Mr. Beehler, I have two other young ladies here in the court room who I believe would testify substantially the same; would you stipulate that they would testify substantially the same as to their books of exhibits?

Mr. Beehler: Yes. I would, though, like to ask them respectively a couple of questions. [145]

The Court: All right. They can be sworn. Call the next one.

Mr. Pattishall: May it be stipulated that their testimony on direct would be substantially the same as the witness Miss Trotman?

Mr. Beehler: That is satisfactory.

## CLAUDEAN IVES

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Claudean Ives.

The Court: Miss Ives, you were one of the young ladies who did the research?

The Witness: That's right.

The Court: You heard the testimony given by Miss Trotman about the technique that she followed?

The Witness: Yes.

The Court: Did you follow the same technique?

The Witness: We were all given the same instructions.

The Court: Did you follow them?

The Witness: I didn't follow them exactly like she did, because I had my own way of interviewing.

The Court: But in substance the method of interview was the same? [146]

The Witness: Yes, because I didn't know any more about it than she did.

The Court: And your sheets—they are right in front of you, which number is it?

The Witness: This is it.

The Court: What number is it?

The Witness: 12.

(Testimony of Claudean Ives.)

The Court: Are those in the same condition in which you turned them over except for the ink capital letters marked on each?

The Witness: Only that I didn't follow instructions and insert a plain sheet where I had an omit, or a void, I guess I should have said.

The Court: All right. Go ahead.

#### Cross-Examination

By Mr. Beehler:

Q. Did I understand your name to be Cass?

A. Ives.

The Court: Ives, I-v-e-s.

Q. (By Mr. Beehler): Did you, Miss Ives, test yourself on one of these sheets?

A. No, I didn't.

Q. Have you ever bought or seen a lamp bearing the name "Sunbeam" other than the one that you used in this survey? A. No. [147]

Q. How much shopping do you do for your own household?

A. Well, all for my own personal use. I live in the sorority house.

Q. Before you left home did you ever do any for your own family? A. Oh, yes.

Q. Did you ever buy any decorative table lamps for the home? A. Yes.

Q. What did you personally look for when you went to buy a decorative table lamp?

(Testimony of Claudean Ives.)

A. The style that suited me mostly. I never looked at trade-marks.

The Court: You say you live at home?

The Witness: I live in a sorority house.

Q. (By Mr. Beehler): Among these 100 answer sheets which you have here, do you recall offhand about how many were men?

A. I believe I only approached two men.

Q. Two men out of 100?

A. Yes. Mostly because they were busy or had some business downtown, I didn't want to disturb them.

Q. On any of the 100 or so persons whom you approached, did you call their attention particularly to the label that appeared on the photograph? [148]

A. In a few instances I said, "Did this company make any other products?" and they would have to look closer, so I would point to the lamp and they would then look at the trade-mark.

Q. Did any of them remark about the name Expert Lamp Company, which appears on the photograph?

A. I don't recall. I had no knowledge of what the trade-mark meant at the time of the survey, and I don't recall.

Q. You never saw, actually, the lamp, either, did you? A. No, I know nothing about it.

Q. Only the photograph? A. Yes.

Mr. Beehler: That is all.

(Testimony of Claudean Ives.)

The Court: Any questions?

Mr. Pattishall: No.

The Court: Step aside; call your next witness.

Mr. Pattishall: Miss Algyer.

The same stipulation, Mr. Beehler?

Mr. Beehler: Yes. [149]

### KATHRYN HELEN ALGYER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Kathryn Helen Algyer.

Mr. Beehler: Any questions, your Honor?

The Court: You are one of the young ladies in charge of this survey?

The Witness: I was helping with the survey, sir.

The Court: And you followed the same technique that the others followed?

The Witness: Yes, sir.

The Court: What is the number of your book, will you look at it?

The Witness: It is 11, sir.

The Court: You turned it over to Mr. Enfield?

The Witness: Yes.

The Court: It is in the same condition except for the letters marked in ink, the capital letters, is that true?

The Witness: That is true, sir.

The Court: All right. Go ahead.

(Testimony of Kathryn Helen Algyer.)  
Cross-Examination

By Mr. Beehler:

Q. Miss Algyer, did you ever check yourself on this same questionnaire that you passed out to other people? [150] A. No, sir.

Q. Have you ever bought or seen a lamp bearing the name "Sunbeam" other than the one that you used for the purpose of the survey?

A. No, sir.

Q. You live at home now, do you?

A. Yes, sir.

Q. Do you do any shopping at all for your own household? A. Some of it, sir.

Q. Have you ever bought a decorative table lamp for your own use or household use?

A. Not that I can recall, sir.

Q. You have them in your home, do you?

A. Yes, sir.

Q. What is it that you consider important in the selection of a table lamp for your own home?

A. I don't know, sir.

Q. What are the things about a lamp that prompt you to buy one rather than another?

A. Quite frankly, sir, all I have ever purchased has been a study lamp, and that has been for light, and it has never occurred to me to try and merit a lamp as to how I would purchase it myself, because my mother, of course, does all that for our family. [151]

Q. Among the questionnaires which you sub-

(Testimony of Kathryn Helen Algyer.)  
mitted here in this booklet, Plaintiff's Exhibit 11, about how many men signed their names or answered one of the questionnaires?

A. Five or six, sir.

Q. Five or six out of 100?        A. Yes, sir.

Q. Did you make any special effort to ask women to answer, rather than men?

A. No, sir. Because when you go in shopping districts, they are mostly women, anyhow. 90 per cent of the shopping is done by women, and most housewives are women.

Q. Did you ever question any shopkeepers or sales persons along the lines that you questioned housewives?        A. No, sir.

Q. You did, then, select persons, at least to that extent, by avoiding shopkeepers and sales persons?

A. It wasn't a question of avoiding them, sir; it was a question of their not being able to be at our disposal.

Q. Did your instructions include instructions not to question sales persons?        A. No, sir.

Q. Can you tell us why you avoided the shops and stores, then?

The Court: As I gather it, it wasn't a question of avoiding them, she said they were just not on the list. [152]

The Witness: They just didn't come to us. We are not going to take the time to keep going in shops constantly. Besides they might not like it. They might not have the time.

Q. (By Mr. Beehler): Then that was a matter of election, is that it, that you didn't go into stores?

(Testimony of Kathryn Helen Algyer.)

A. What do you mean by "election"?

Q. A matter of choice on your part, is that it?

A. More or less, sir.

Mr. Beehler: That is all.

The Court: You said you never saw a lamp other than the picture. You have never seen a lamp which had the word "Sunbeam" on it?

The Witness: No, sir, except the one in this court room.

The Court: Does the word "Sunbeam" carry any meaning to you?

The Witness: Yes, sir.

The Court: What does it carry to you?

The Witness: Ever since I have been a little girl my mother has wanted a Sunbeam Mixmaster.

The Court: So long as counsel asked you the first question, supposing I asked you, "Does the company Sunbeam make any other products?" what would your answer be?

The Witness: Well, yes, sir, because I know now, sir. [153] After having surveyed all these people, we hear about the toasters and shavers.

The Court: But you knew about the Mixmaster before you interviewed these people?

The Witness: Yes, sir.

The Court: All right.

Mr. Pattishall: Your Honor, my case in chief will be complete as soon as I have put in a reaction test that was taken two years ago at the same time the reaction test was taken which we introduced in the lighting case. It was taken the same days by different people. It was much more extensive

(Testimony of Kathryn Helen Algyer.)

than this one. It is very interesting, I believe I can comment, that the percentage in that one of confusion was 51 per cent, and in this one it was 56 per cent. Why, I don't know. However, there was a close correlation.

The Court: All right.

Mr. Pattishall: I think I can get that in pretty quickly.

Mr. Lampa, take the stand. [154]

### HOWARD L. LAMPA

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Howard L. Lampa.

### Direct Examination

By Mr. Pattishall:

Q. Give me your full name, sir.

A. Howard L. Lampa.

Q. Where do you live?

A. 419 Ellis Avenue, Wheaton, Illinois.

Q. What is your occupation?

A. Trade-mark research.

Q. How long have you been so engaged?

A. Approximately 19 years.

Q. What is the nature of your work in that field, briefly?

A. I was working generally with attorneys acquiring evidence of the secondary meaning of trade-

(Testimony of Howard L. Lampa.)

marks and developing confusion or the likelihood of confusion in connection with trade-marks.

Q. Have you ever done any research in connection with the word "Sunbeam"?

A. Yes, sir, I have.

Q. When was that? [155]

A. March and April, 1948.

Q. Where? A. In Los Angeles.

Q. By whom were you employed to do this research? A. Sunbeam Corporation.

Q. What was your assignment?

A. To make a survey in Los Angeles to determine whether middle income groups would on seeing a lamp bearing the trade-mark "Sunbeam" associate it with the Sunbeam Corporation or products put out by the Sunbeam Corporation.

Q. Will you tell us what you did to carry out this assignment?

A. Yes. We first purchased a lamp bearing the trade-mark "Sunbeam" and had it photographed. I then got up a questionnaire and after that I went to the Los Angeles Real Estate Board and had them mark out five areas in Los Angeles which they would classify as middle income neighborhoods. I then employed three girls and instructed them to go to homes in these areas and show them a photograph of the lamp and ask them questions which were on a questionnaire form.

The Clerk: Plaintiff's Exhibits 16, 17 and 18 marked for identification.

Q. (By Mr. Pattishall): Mr. Lampa, I show you Plaintiff's Exhibits 16, 17 and 18 for identifi-

(Testimony of Howard L. Lampa.)

cation, and ask if you will tell me what they [156] are.

A. Plaintiff's Exhibit 16 is the questionnaire sheet which I got up and which the girls used. There were 1500 interviews. Plaintiff's Exhibit—

Q. How many interviews?

A. 1500. Plaintiff's Exhibit 17 is the photograph of a lamp bearing the trade-mark "Sunbeam" which was used in the survey. And Plaintiff's Exhibit 18 is a copy of instructions which I gave to Mrs. Still, Mrs. Sahl and Mrs. Sapp.

Q. Will you proceed with your story?

A. During the latter part of March and the early part of April the girls went into these areas, and as they completed the survey, completed each book of 50 interviews—

Q. Excuse me. Did you mention what areas?

A. There were five areas. Area 1 was from Crenshaw Street to Western, to Manchester to Florence; area 2 was Avalon to Central, and Manchester to Florence; area 3 was Beverly to Melrose, Larchmont to Western; area 4 was the Metropolitan housing project; area 5 was Ferguson to Whittier, and Atlantic to Concourse. All during the time the girls were making the survey I appeared in the territory with them every day, at times walked down the street with them, was able to hear them making interviews and observe what they were doing. I kept a very strict watch on the survey and how it progressed. And as they finished each book of 50 sheets, [157] those sheets were then turned over to me for tabulation.

(Testimony of Howard L. Lampa.)

Q. How would you tabulate them?

A. The tabulation showed that there were, out of 1500, 766 persons who on seeing this photograph associated it with products of the Sunbeam Corporation, which is approximately 51 per cent of all the persons interviewed, therefore, that were confused.

Q. Why did you decide to stop at 1500?

A. We figured 1500 interviews for one city was sufficiently large and covered a good portion of the type of people we wanted to interview.

Q. Did you make a tabulation at lower figures? Did you ever reach any point of uniformity?

A. Yes; as the survey progressed the figures became more and more uniform. In other words, by tabulating by books the figures became more uniform.

Q. Do you happen to have the breakdowns on those figures?

A. No, sir, I don't have those figures.

Q. But you did make them at the time?

A. I did make them, but I don't have them now.

Mr. Pattishall: I hate to burden the record with this material, your Honor, but these are the original sheets.

The Court: You don't need to. You may just identify them and have him give the summaries, and that is sufficient [158] compliance with the rule in this Circuit. The originals are available. He can give us the computation from them, and if counsel wants them, they can examine them. There is no use to put that kind of a record in.

There is an alternative. On any record on appeal,

(Testimony of Howard L. Lampa.)

you will either have to send them up as they are or do an awful lot of printing.

Mr. Pattishall: Mark them for identification.

The Clerk: Is it actually necessary to physically mark them for identification, your Honor?

The Court: Yes, I think you had better mark it for identification, one of them, and put a tag on the group, and then if you withdraw them, put one in as a sample.

The Clerk: Plaintiff's Exhibits 19, 20 and 21, marked for identification.

(The documents referred to were marked for identification Plaintiff's Exhibits 19, 20 and 21.) [159]

Q. I call your attention to Plaintiff's Exhibits 17 and 18. Have you testified to those before?

A. Yes, I have.

Mr. Pattishall: I offer Plaintiff's Exhibits 16, 17, and 18 for identification into evidence as Plaintiff's Exhibits 16, 17, and 18.

The Court: All right. They may be received.

The Clerk: Plaintiff's Exhibits 16, 17, and 18 received in evidence.

(The documents referred to, previously marked Plaintiff's Exhibits 16, 17, and 18 for identification, were received in evidence.)

Q. (By Mr. Pattishall): Mr. Lampa, there are before you Plaintiff's Exhibits 19, 20, and 21, which are batches of notebooks. Have you examined those notebooks?

A. Yes, I have.

(Testimony of Howard L. Lampa.)

Q. Where have they been during the past two years?

A. They have been in our office in Chicago, until the time they were brought here to California for the trial.

Q. Have they been in any way altered since they have been filled out by the interviewers which you mentioned?

A. None, except on the margin of the right-hand margin of the sheets I would put down some letters which were my code letters for tabulating. Outside of that, there have been no alterations whatsoever on these sheets. [160]

Q. Will you explain what your code was?

A. Under Question 1 there are four classifications, persons who have bought the lamp, seen the lamp, have never seen the lamp, and don't know. So we would just put on the margin a B and S and N or a D, depending on how the question was answered.

Now, in Question 2, on the margin, we would indicate either a B, S, N, or D, whether they bought, seen, or never saw, or didn't know.

Another letter would follow that which would indicate whether or not the person was confused, possibly not confused, and an indefinite classification. By an indefinite classification I mean where we would ask a question and they would probably come back and ask, "Is that the company that makes the iron?" We would not classify that as a confusion; we would put it in an indefinite classification.

(Testimony of Howard L. Lampa.)

The only confusion we would list is where people very definitely came out and said, "Yes, I have a Mixmaster," or, "I have an iron," or indicate products.

Question 3, we would use the initials M, H, L, or N, for most, half, little, or none. That is in connection with how much shopping they do for the household. And below this we would have either O-40 or U-40. That would mean they were under 40 or over 40.

Under that normally would be the initial M or F, [161] indicating whether it was a male or female, the person interviewed.

Q. Are you familiar with the test conducted by Mr. Enfield? A. Yes, I am.

Q. What is the difference between this test and the one conducted by Mr. Enfield?

A. I believe on this test we had 51 per cent. Mr. Enfield's test was 56.3 per cent confusion.

Q. I mean, was there any difference in the survey sheet or in the manner in which the tests were conducted?

A. I believe the survey sheet was identical, except for the information at the top. I don't believe they had the age or sex classifications at the bottom.

We did not make any attempt to have a person fill in the sheet themselves. We filled the sheet in ourselves and handed the book to the person being interviewed and asked them to sign it. If they refused to sign it, we would then ask their name and address and put it in ourselves, or, rather, the girls would, I should say.

(Testimony of Howard L. Lampa.)

Q. Of course, the photograph of the lamp was a different lamp which bore the trade-mark Sunbeam?

A. Yes, the photograph was a different photograph.

Mr. Pattishall: That is all. [162]

### Cross-Examination

By Mr. Beehler:

Q. Mr. Lampa, among the 1,500 interviews which you reported upon, not one of those persons was shown an actual lamp, were they?

A. No, sir.

Q. Not one of those persons was shown one of the labels which was attached to the lamp that you took a photograph of? A. No, sir.

Q. Mr. Lampa, you have made a great many surveys of various kinds?

A. Well, I have made quite a few.

Q. You have a substantial amount of experience in picking questions to produce results?

A. Well, we have designed quite a few survey sheets, yes.

Q. Can you tell me, Mr. Lampa, what prompts you to show a photograph of a lamp, such as this (indicating), and to leave out of the picture all environment? Why do you just show the lamp by itself? A. Why did I show it all by itself?

Q. Yes.

A. I thought it would be clearer and less con-

(Testimony of Howard L. Lampa.)

fusing to the person being interviewed. If you had other objects [163] in there, their eyes might wander or their minds might wander.

Q. It is true you could have framed questions in connection with the Sunbeam lamp which would have produced an altogether different percentage result than the way it turned out?

A. Not and still have it undetected.

The Court: He wants to know if you could slant the questions——

The Witness: It could be done. Anyone familiar with surveys could have detected it very rapidly, though.

Q. (By Mr. Beehler): I show you a picture here, Mr. Lampa, in Furniture Field, February, 1949, which I will introduce for identification as Defendants' Exhibit C.

The Clerk: Defendants' Exhibit C marked for identification.

(The document referred to was marked Defendants' Exhibit C for identification.)

Mr. Beehler: That is, page 12.

Q. (By Mr. Beehler): I call your attention to a decorative table lamp on a table or stand of some kind, sitting between two pieces of upholstered furniture.

Is it not true that if you showed a picture of a Sunbeam lamp in that sort of an environment you would get an altogether different percentage in your answers?

(Testimony of Howard L. Lampa.)

A. No, I don't think that is true. The people were [164] able to see the name of Sunbeam on there; if they were, I don't believe it would change the results.

Q. Did you ever run a survey for furniture in connection with Sunbeam? A. No, sir.

Q. Furniture of any kind? A. No, sir.

Mr. Beehler: If I may, I would like to hold that for introduction until tomorrow. I have a number of other things I want to introduce in connection with it.

The Court: That is all right. You do not have to offer it now. You can do that tomorrow as part of your case.

Q. (By Mr. Beehler): Is it not true, Mr. Lampa, that you could frame questions and accompany them with a picture of a different sort, in order to get a different result in a survey of this kind?

A. I don't quite understand what you mean. Are you talking about the picture or the questions, now, or both?

Q. In combination.

A. Well, I believe it would be possible, as I said before, to slant a survey, but I don't believe it is possible to do so without it being detected by somebody that knows something about surveys.

The Court: In other words, you could frame your questions so that they would know what you are aiming at? [165]

The Witness: Yes, you could put in leading questions and suggestive ones. You could do that.

(Testimony of Howard L. Lampa.)

The Court: You could put in questions, such as the type we have asked here: What does the word "Sunbeam" spell out? And you would get a much more favorable reaction than the question you had as to what other objects the concern makes.

The Witness: That is right.

Q. By Mr. Beehler): You have been in lamp departments in stores, have you not?

A. Oh, yes.

Q. You know in those lamp departments there are virtually hundreds of different styles, varieties, and colors of lamps?

A. There are some stores, sure.

Q. Wouldn't you get a much more accurate survey, much more accurate picture, if you would show to the person answering the questions lamps in the environment of which they would purchase them as purchasers?

A. You say "more accurate"?

Q. More accurate. A. I don't believe so.

Q. When a person buys a lamp he usually looks at more than one lamp?

A. They look at one lamp at a time. I don't think they stand off at a distance and look at a hundred lamps. [166] Normally, they examine each lamp.

Q. They look at a number of different lamps before they make a selection.

A. I would assume so, yes.

Q. In your survey you showed them just one lamp? A. That is right.

(Testimony of Howard L. Lampa.)

The Court: You were not testing them as to whether they would like to buy this lamp or whether they preferred it?

The Witness: No, sir.

The Court: You were not asking them what they would do if they were in the market to buy one?

The Witness: That is right.

The Court: You were merely asking them whether it had any meaning to them?

The Witness: Yes.

The Court: Whether they knew the company that manufactured it?

The Witness: Yes.

The Court: Whether they had ever bought one or whether the company made other products?

The Witness: Yes.

The Court: I think it would be conceded that many people, in buying a lamp, would want to look at the shape of the lamp and its contour and coloring and so forth. That does not detract from the fact that a person buying a lamp, other [167] things being equal, and being told it was Sunbeam, would think it was made by the defendant.

Q. (By Mr. Beehler): Before you framed your questions, Mr. Lampa, did you make any investigation of the buying habits of people that bought lamps? A. No, sir.

Q. Then, when you framed your questions you had no idea of what a housewife looks for when she goes to buy a lamp?

(Testimony of Howard L. Lampa.)

A. Other than having been in a store with my own wife when she was looking for lamps.

Q. So that the set of questions and circumstances set up in your questionnaire are really distorted, are they not, from what would naturally take place when a person buys a lamp?

A. Well, we weren't selling lamps.

The Court: You were not investigating the lamp-buying habits of the people?

The Witness: That is right.

The Court: I think it is an argumentative question. It is quite evident what they were trying to show is what the words on a product meant, not the buying habits of the people who bought lamps.

Q. (By Mr. Beehler): Among the fifteen hundred or so persons who answered your questions, were any of them shopkeepers, sales persons? [168]

A. I don't know. They were interviewed at their homes. I assume that the women, particularly, they are housewives.

Q. The survey then was directed solely to persons in their homes?

A. Yes. I believe on a few occasions they might stop a person walking down the street. We did not interview people on street corners, normally.

Q. You have never interviewed people in shops?

A. No.

Q. And particularly you never interviewed anyone in a lamp shop? A. That is right.

Mr. Beehler: That is all.

(Testimony of Howard L. Lampa.)

The Court: All right. Is there any redirect examination?

Mr. Pattishall: No, sir.

The Court: Step down.

(Witness excused.)

Mr. Pattishall: Mrs. Sahl.

### BEVERLY SAHL

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Beverly Sahl. [169]

#### Direct Examination

By Mr. Pattishall:

Q. Would you give me your full name, please?

A. Beverly Sahl.

Q. Where do you live?

A. 1428 West 59th Street, Los Angeles.

Q. What is your occupation?

A. Housewife.

Q. Did you ever do any trade-mark research work involving the word "Sunbeam"?

A. Yes, I did.

Q. When?

A. In the latter part of March and the early part of April of '48.

Q. Where was it?

A. In the Los Angeles area.

(Testimony of Beverly Sahl.)

Q. Will you tell me in your own words, as briefly as possible, what you did and what your instructions were?

A. Well, I went to the Dunn and Dunn Agency, to get a job. They told me that they didn't have anything, only just a temporary job at the time, and I told them I would take it.

They told me it was in survey work. That I could contact Mr. Lampa at the Clark Hotel, which I did. He gave me written instructions, with a survey sheet, and I followed the instructions. [170]

Q. Those instructions correspond to Plaintiff's Exhibit 18? Will you look at it, please?

A. That is right.

Q. Tell me in a little more detail what work you did when you commenced this job?

A. Well, we were assigned a survey sheet and we went out to the areas we were assigned to.

I went up to their homes and called on the housewives, and I asked them the questions that were given to me on the survey sheets.

I wrote down just what they answered, and I asked them to sign their names.

When I finished with the survey sheet I turned it over to Mr. Lampa. If they didn't sign their names I asked them to give me their name and they gave me their name, and I wrote it down myself.

Q. Have you examined any of the books piled up in front of you which are marked for identifi-

(Testimony of Beverly Sahl.)

cation as Plaintiff's Exhibits 19, 20 and 21?

A. Well, I looked at them before I came on the stand and—

Q. Today, in the court room? A. Yes, sir.

Q. Did you look through them carefully?

A. Yes, I did. [171]

Q. Which pile is yours?

A. The gray books, with the exception of two, I believe, were blue.

Q. Had there been any alterations or removals that you can observe?

A. There hasn't been any removals or alterations, except the green letters at the right-hand side.

Q. Do the books in Plaintiff's Exhibit 20 comprise the whole of your work?

A. Just what do you mean by that?

Q. That is all that you did for Mr. Lampa?

A. Well, I presume it was. I mean, I turned in all my books. I gave them to him. It was about 600 people that I interviewed.

The Court: How long did it take you?

The Witness: Oh, we were on the job about three weeks, but with the exception that there were some days it was raining and we couldn't work.

The Court: How many could you do in a day?

The Witness: Well, we tried to do around 50.

The Court: All right.

Mr. Pattishall: I think that is all.

The Court: Cross-examination.

(Testimony of Beverly Sahl.)

Cross-Examination

By Mr. Beehler:

Q. Mrs. Sahl, I notice you are a housewife, in addition [172] to having worked on this survey?

Have you, Mrs. Sahl, ever purchased lamps for your own house?

A. Other than floor lamps, no.

Q. What kind of furniture do you have in your house, what period of furniture?

A. Well, I would just say the ordinary furniture for any home.

Q. Do you make any attempt to have the lamps in your home conform with the kind of furniture you have? A. Well, no, I don't.

Q. Do you know what trade-marks are on the lamps that you have in your house?

A. No, I don't.

Mr. Beehler: That is all.

The Court: I want to ask you one question, Mrs. Sahl. Before you did this survey work, what meaning did the word "Sunbeam" have for you, before you began the survey, if you can put yourself back before you were employed to do this survey work?

The Witness: Well, my husband has a Sunbeam Shavemaster and I also have a Sunbeam waffle iron.

The Court: You had that before?

The Witness: Yes.

The Court: If you had been asked the question,

(Testimony of Beverly Sahl.)

as to [173] what products, or if you had been interviewed and shown this lamp and been asked what other products the Sunbeam Company manufactures, what would your answers have been, before you were employed on this survey work?

The Witness: You mean other than the lamps?

The Court: Yes. If you had been asked that question No. 2 before you began the survey, what would you have answered?

The Witness: I would have said they made a Shavemaster, the Mixmaster and the Coffeemaster.

The Court: All right.

(Witness excused.)

Mr. Pattishall: Mr. Beehler, will you stipulate that Mrs. Still's testimony on direct would be substantially the same as Mrs. Sahl's, with respect to her books?

Mr. Beehler: So stipulated.

### JACKIE JEAN STILL

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Jackie Jean Still.

The Court: Let me ask one or two leading questions. You took part in this survey?

The Witness: Yes, I did. [174]

The Court: And you followed the same pro-

(Testimony of Jackie Jean Still.)

cedure as the witness preceding you, who testified?

The Witness: Yes.

The Court: You turned the books over, and you have looked at them since you turned them over?

The Witness: No, I haven't.

The Court: Take a look at some of them and see if any relate to yourself.

The Witness: These are mine (indicating).

The Court: Those are yours?

The Witness: Yes.

The Court: Are they in the same condition as when you turned them in?

The Witness: They look like they are, except these—

The Court: The lettering on the side?

The Witness: Yes.

The Court: Which is a means of identifying them?

The Witness: Yes.

The Court: All right. Go ahead.

#### Cross-Examination

By Mr. Beehler:

Q. Mrs. Still, are you a housewife?

A. No, I am not.

Q. What sort of premises do you live in? An apartment? A. Yes. [175]

Q. Do you have a family? A. Yes.

Q. Do you have lights in your apartment?

A. Yes.

(Testimony of Jackie Jean Still.)

Q. Are there table lamps?

A. No. I have a floor lamp.

Q. What trade-marks, if any, are there on those floor lamps? A. I don't know.

Q. You don't know?

A. No. I never looked.

Q. Did you know when you bought them?

A. I didn't buy it. My apartment is furnished.

Q. Since making this survey, have you taken occasion to look to see what trade-mark is on the lamp in your own house? A. No.

Mr. Beehler: That is all.

The Court: Before you made this survey, did you hear the word "Sunbeam"?

The Witness: Yes.

The Court: In what connection did you hear it?

The Witness: My sister has a Sunbeam Mixmaster and my mother also had one, and I had heard of the other products.

The Court: Now, before you worked on this survey, if [176] you had been asked if the Sunbeam Company produced other products than the lamp as represented in the picture, what would your answer have been?

The Witness: Well, I would probably have said yes.

The Court: What would you have named?

The Witness: Sunbeam Mixmaster and Coffeemaster, toaster.

The Court: I gather no one in your family uses an electric razor?

(Testimony of Jackie Jean Still.)

The Witness: They used to.

Q. (By Mr. Beehler): You mentioned Mixmasters and these other products. Is it also your impression that the Sunbeam Corporation makes a Toastmaster?

A. Well, they make the toaster or the Toastmaster. I know it is one of the two.

Mr. Beehler: That is all.

Mr. Pattishall: Which group of books was yours?

The Witness: These (indicating).

Mr. Pattishall: That is Plaintiff's Exhibit 21 for identification?

The Witness: Yes.

The Court: All right.

(Witness excused.)

Mr. Pattishall: Your Honor, we had one more interviewer who participated in this test, but who has moved to Oklahoma. If necessary, we will send for her. [177]

The Court: I think the evidence in the record shows the technique has been followed.

Mr. Beehler: I have no objection, your Honor.

The Court: I am not going to penalize you in any manner or draw any inference from the fact that you don't have the other witness.

Mr. Pattishall: The plaintiff rests, your [178] Honor.

The Court: Gentlemen, it is near adjourning time, and we have reached a good stopping point.

We have made good progress and there is no need keeping longer hours than we have already.

We will continue the matter until tomorrow morning at 10:00 o'clock. There will be no interruption in the morning. We will proceed right on time, because this is the only case. This case has priority until Thursday, at which time I hope we will be through. If not, you still have priority.

Mr. Beehler: We anticipate, your Honor, we will certainly take no longer than tomorrow and possibly not all day.

The Court: I will cut down the lunch hour probably more, if it looks as though we might not finish, because this other case is a jury trial and I have a jury I called for Thursday morning. Of course, if we are not through we will just have the jury wait, and excuse them.

As I say, I do not want to curtail you in any way in the presentation of your testimony. There is only one question I might bring up at this time. I have not referred to it before. It is a question that came up in the other suit, a question which has been coming up in this circuit repeatedly.

I take the law to be that if the evidence does not show that there is a confusion of source or likelihood of confusion of source, it does not make any difference, that the field is entirely different. Nor does it make any difference that [179] the product is different.

You seem to stress a good deal on the proposition that the plaintiff does not manufacture lamps, Mr. Beehler. So there will be an understanding about

my possible ruling, I take the view it does not make any difference.

It is true that some of the cases we discussed this morning, such as the Brooks case and the Stork Club case and the Safeway case and the other late cases, the Maternity Lane case, and one case that was not mentioned, the Lerner Stores case, that there was an element there of similarity in the field.

While a saloon on Market Street in San Francisco is not the Stork Club, they do sell drinks, and under the California law they must sell food along with the drinks. As I view the law, it does not make a bit of difference, if there is likelihood of confusion. The best illustration we have in this circuit is the decision of our own circuit in the Del Monte brand case. In that case the court was confronted with the argument that the man was using Del Monte in conjunction with margarin. Del Monte Canning Company was not producing margarin. There was no showing they ever intended to produce margarin, and yet Judge Wilbur, who, as you know, had a long career on the bench of California, beginning as a judge of the Superior Court of this County—I tried my first case as a lawyer in this county before him, but not as a lawyer [180] in the State—made it very emphatic it did not make a bit of difference.

In anticipation of the defense, I want to state my understanding of the law. If you know anything that has changed this law, I will be very glad to have you call it to my attention.

This principle applies both to trade-mark in-

fringement and also unfair competition. I will point out in a moment how the courts of California in the very latest cases on the subject have taken this statement I am about to read and made it applicable to the law of unfair competition. The law of unfair competition at the present time is governed by state law. Fortunately, the law of unfair competition of California is identical with what the general law has been in the federal courts.

I am reading from *Del Monte Special Food Co. v. California Packing Corporation*, 34 Fed. (2d) 774. I am reading from page 775:

“The contention of the appellant is that, inasmuch as the appellee has not produced, and does not now produce, oleomargarine or use its label thereon, it is not and cannot be damaged by the use of ‘Del Monte Brand’ upon the oleomargarine marketed by the appellant. The injury to the appellee by the use of the Del Monte Brand by the appellant does not [181] result from preventing sale by appellee of oleomargarine of its own, but from a representation to the public that it produces a product which it does not in fact produce and over which it has no control. Its reputation for quality is therefore placed to some extent in the hands of a corporation who owes it no allegiance and has no concern in maintaining the high reputation established by the appellee, and who may utilize that reputation to sell the public an inferior production. Thus every effort made by the appellee to increase the volume and variety of

its products and maintain its high standard of quality by its systematic and expensive advertising campaign and by care in the preparation of its products redound to the benefit of the appellant, which does not contribute in any manner to the expenditures involved in this vast undertaking, and whose only motive for the adoption of the same 'brand' is to get the advantage of appellee's name, reputation, and good will. The law of unfair competition has resulted from the application of a simple proposition to the extension and modern development of manufacturing and merchandising. That principle may be expressed in the language used by the various [182] courts when dealing with the subject of unfair competition, as follows: 'That nobody has any right to represent his goods as the goods of somebody else.' "

Then they go on and cite from Judge Learned Hand's famous statement in Yale Electric Corporation, and they cite the Aunt Jemima case and the Akron-Overland case, and other cases.

The courts of California have followed this principle. One of the latest cases is a very long case, California Prune Association v. H. R. Nicholson Company, decided in 1945, 69 Cal. App. (2d) 207. The opinion is written by Judge Sturtevant. That was the famous case involving the Sunsweet prunes. The man used the word "Sunsweet" in connection with a portion of his name, "Nicholson" and called it "Nicholson's Sunsweet." The court held that it was both infringement of trade-mark and unfair

competition. In that case they refer to the identical argument that was made in the Del Monte case. After distinguishing the Washburn and Gold Medal Flour case, this is what they say:

“The distinctions made by the defendant are not sound. The correct test to be applied was stated in Sun-Maid Raisin Growers v. Mosesian. In that case the court said: ‘The authorities are fairly uniform to the effect that it is not necessary to prove actual fraud or deception, but this may be assumed where the facts indicate that a purchaser, exercising ordinary care, would be likely to be [184] deceived by the imitation of a trade-mark.’ ”

Then they quoted the identical paragraph which I read from the Del Monte case ending with the words that I read, “That nobody has any right to represent his goods as the goods of somebody else.” Then they go on and also hold that the mere fact that the registration may have been under a different classification does not affect the ultimate result.

The later case is in 79 Cal. App. (2d), decided in 1947, and that is the Physicians Electric Service Corporation against Adams. That is the electronic case, as we call it. In that case a man used the name called Physicians Electronic Corporation, and the court held there was infringement. It is interesting to note that in both of these cases the courts held that whether you look at it from the standpoint of trade-mark or you look at it from the standpoint of unfair competition, the result is the same.

They also refer to the Rosenthal case, where a man ran a store called the Family Shoe Store, and they held that a man couldn't put his name in front of that and call his Rosenthal's Family Shoe Store. Here is a point. I am reading from the Nicholson case, page 219:

“Addressing ourselves to the first count of Plaintiff's complaint pleading infringement of trade-marks, it was not necessary that the [185] plaintiff should prove actual confusion of goods.”

Then they cite the Del Monte case and another case.

“Addressing ourselves to the second count of plaintiff's complaint pleading unfair competition, the rule is the same.”

So that in all these cases it is the likelihood of confusion from similarity that is the test and not actual confusion.

I thought I would point that principle out to you so that we would have an understanding as to what I consider the law of California to be on the unfair competition angle. And, of course, we all concede that the law of this district, so far as the trade-mark angle is concerned, has been settled in the last three three or four years in the cases that we all know, and which give us all phases of this question.

Mr. Behler: May I have the page citation in 79 Cal. (2d) ?

The Court: It is page 550, Physicians Electric Service Corporation against Adams.

So long as we are talking about that case, here is the paragraph I was looking for and couldn't find. When you are in a hurry you never can find them.

On page 551:

“It is sufficient to enjoin the use of [186] such names by competing businesses if the imitation name tends to deceive customers and injures plaintiff's business.”

In other words, it is the tendency, and that is a question of fact to be determined by the court, whether there is likelihood.

All right. Tomorrow morning at 10:00 o'clock.

(Whereupon, at 5:05 o'clock p.m., Tuesday, February 14, 1950, an adjournment was taken until 10:00 o'clock a.m., Wednesday, February 15, 1950.) [187]

\* \* \*

Mr. Pattishall: Your Honor, we believe that we have proved all of the essentials of our case, both as to unfair [279] competition and as to trade-mark infringement. We feel that we have proved our ownership and use, our widespread advertising, our 21 years priority; that we are known as “Sunbeam” and have been known as “Sunbeam” for many, many years in the past. We have proved the secondary meaning of our trade-mark by the testimony of dealers and consumers. We have proved actual confusion, principally by the testimony of Mr. Garriott, between ourselves and the defendants. We have proved, we believe, the likeli-

hood of confusion by two unimpeachable surveys taken two years apart, which came out with very closely corresponding results. We feel that the defendants' own exhibits demonstrate their usage, and that those exhibits speak for themselves.

As to the infringement aspects, I believe the law is clear that middlemen are as liable as anyone else. I have covered that somewhat in my memorandum trial brief. I think the Restatement puts it very clearly, the Restatement of the Law of Torts.

As for the unfair competition aspects of the case, I think your Honor summarized that completely last night. The Brooks case, the Safeway case, the Stork case, the Del Monte case, and a host of others all demonstrate and hold that the actions of the defendant in this case constitute an unfair practice, and that they are liable accordingly.

We ask that they be enjoined so that our identity may be [280] protected. We ask for little else. As I did before, I waive damages. I think, actually, under the doctrine of the Brooks case we are not entitled to an accounting and damages, because we didn't sue early enough. It is spelled out very clearly, I think, in the last five pages of your Honor's decision. I can't argue contrarywise.

As I have said before, all we seek here, sir, is a shield, not a sword.

The Court: All right. Mr. Beehler.

Mr. Beehler: There appear to be two questions which need to be resolved. One is whether or not there is trade-mark infringement by the actual defendant in this case, and the other is whether or

not there has been unfair competition on the part of the defendant in this case.

Your Honor has referred to a number of decisions as bearing upon the point. Your Honor is well familiar with the trade-mark law in that respect. We have, then, to apply the facts in this case to the law as it is laid down in those other cases on sets of facts which were pertinent particularly to those cases.

In this case we contend, contrary to the plaintiff, that there has been no actual confusion proved. It is true that one witness, Garriott, cited a single instance where he purported to say that an indignant customer had become provoked because he did not carry the Sunbeam lamp. [281]

It was sketchy testimony, not at all conclusive.

One of the plaintiff's witnesses, a paid investigator, Gibson, attempted to show that some retail dealer, or other, unconnected in any way with any party here had supposed that the Sunbeam Mixmaster Company was maybe the same one who made a certain Sunbeam lamp. Those are the only proofs offered of actual confusion on the part of the plaintiff.

Plaintiff's own witness, Mr. Wallick, who had handled their line for 18 years, and who had handled lamps, as well, could cite no instance of confusion in his shop in 18 years.

No other actual instances of confusion have been brought before the court.

To substitute for actual confusion the plaintiff has brought here surveys, surveys carried on by

paid survey companies. They set up their own questionnaires. They were hired by the plaintiff to produce certain results. The surveys are sketchy as to questions. The questions are selected for a certain purpose, and they do not question the interviewers under circumstances which parallel the circumstances where any one of those interviewers would purchase either an appliance or lamp. They were door-to-door canvassers, street corner canvassers, and they questioned 95 per cent women, about 95 per cent housewives.

Even in the most recent survey there were 300 persons questioned, and only two persons out of 300 ever bought a [282] Sunbeam lamp. Only 22 out of 300 ever thought they saw a Sunbeam lamp. And still the questionnaires are phrased to suggest that there are other products possibly made by the Sunbeam Corporation, other than the Sunbeam appliances with which we are all familiar.

Throughout the plaintiff's testimony, almost without exception when the witness was asked what does the Sunbeam Company make, or words to that effect, the first phrase that came to their mouth was the Sunbeam Mixmaster, and then followed a few of their other items in some scattered instances. Without exception, every one of them associated appliances with the name "Sunbeam."

On the other side of that particular point we have had an abundance of testimony by our own witnesses, and the plaintiff's witnesses, to the effect that appliances and household furnishings are dif-

ferent things, they are sold in different ways, they are sold in different stores, they are sold in different departments of the same store, if it be a large one, and they cater to a different customer demand.

Now, it is true that there is an electric plug, a socket and cord. There isn't any bulb in the lamp that we saw, just a socket, cord and plug. The only thing electrical that the defendant here is concerned with is a cord, socket and plug. As far as the lamp itself is concerned, it is [283] purely and simply a decorative element.

The strength of a case which demands relief for unfair competition must have a certain number of factual elements in it. While it may be true that in this Circuit there need not be market competition, and while it may be true that there need not be, perhaps, actual competition between goods, on the other hand there must be some element there which relates the defendants' goods to the plaintiff's goods, or relates the plaintiff's good will to the defendants' good will. There must be some relation between the two.

Now, cases have been cited by your Honor in connection with the law in California with regard to unfair competition, and I would just like to dwell very briefly on the subject-matter of those cases, because I feel that they do not have a parallel in the facts before us here.

In the Modesto Creamery case the goods were identical. It was butter in both instances. In the Sun-Maid Raisin the goods were identical in both instances, it was raisins. In the Wood v. Peffer

case, the goods were identical, they were refrigerators. In the *Winfield v. Charles* case actual confusion was proved, letters written to one concern got to the other, letters written to the other concern got back to the one concern.

Now, with respect to the *Del Monte* case, in that case although the goods were not identical, oleomargarine not having [284] been sold previously by the California Packing Company, nevertheless it was a grocery item sold in grocery stores in almost every instance, and the plaintiff had been selling grocery goods in the same stores for years. Even there, there was actual confusion proved in accordance with the evidence.

In the case of *California Prune v. Nicholson*, again the goods were very closely associated; prune juice in one instance and bottled soft drinks in the other made of fruit juice flavor, and the names were the same, "Sunsweet."

In the case of *Physicians Electric v. Adams*, the services, or such they seemed to be, for the most part, of electrical instruments for physicians were identical, and the names were identical.

And if those are the cases upon which we are to judge unfair competition here—

The Court: Those are not the only ones. Those are some of them.

Mr. Beehler: They are not all of the cases, but they are representative.

The Court: But they laid down the rule. Go back to my own case, the case which preceded this case, the case which we thought at one time we

would try along with this, in that case the business was more unrelated than was this one. The man was chiefly engaged in manufacturing and constructing [285] fluorescent lights, and it was insisted at that time by Mr. Mason, who is a patent lawyer of long experience, that there was no relation between the two. But I applied the rule there. It seems to me at the present time that the law is clear in California on one side, and in the Circuit on the other, that there does not have to be competition. Judge Garrecht made that point very, very plain. A point that I adverted to right in the beginning when I cited from the Stork Club case, that there need not be competition in the field, and Judge Wilbur makes it plain in the Del Monte case.

Of course, if you have a dissimilarity of mark, and also a dissimilarity in product, then of course different inferences can be drawn, and that was the inference I drew in the Vita-Var case. There was a difference in mark, and there was also a difference in product, and there, where there was no similarity between the product and the other I found as a matter of fact that there was no infringement. But I take it that the law is absolutely clear that there need be no similarity. And the unfortunate part of the law is this, that even if the choice of name is fortuitous, as I found in the Brooks case—nothing could be more fortuitous—nevertheless where there was a similarity of name, and in that case, of course, the similarity was in a proper name, the foundation for the action [286] exists.

Mr. Beehler: In the Brooks case, we have just been talking about, there the goods were identical in your Honor's own words.

The Court: Yes. There is another case I did not cite, of *Jackman v. Mau*, 78 California Appellate (2d) 234. They said on page 239:

“Another element involved in cases of this character is the watchfulness of the law in protecting the public from the fraud or deceit resorted to by a pretender to falsely lead the buying public to believe that they are purchasing the goods of the merchant who, through a trade name and honest effort, has established a reputation and public demand for his product (*Carolina Pines, Inc., v. Catalina Pines*, 128 Cal. App. 84, 87 (16 P. 2d 781)). And the fact that defendant was using his own name does not shield him from injunctive action if such use is calculated to cause confusion or to deceive.”

Further it states:

“Also, it is not necessary as a prerequisite to obtaining equitable relief in cases of this character that the names be identical. It is sufficient if though not identical they are sufficiently similar as to cause confusion and injury (*Academy of Motion Picture Arts & Sciences v. Benson*, 15 Cal. 2d 685, 692 (104 P. 2d 650)). [287] In the case just cited (p. 692), the Supreme Court quotes with approval the following rule enunciated in the case of *Cellu-*

loid Mfg. Co. v. Cellonite Mfg. Co., 32 F. 94, at page 97: 'Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law.' "

In other words, the entire stress in both the federal and state law is that on similarity it is likely to mislead, not whether it actually does mislead.

Mr. Beehler: Taking that as a measure of law—

The Court: From the testimony already given, and which I did not know until the last moment, this is not an ordinary case of a man on the West Coast starting out in business. This is a son who starts to use a name of a manufacturing concern that the father conducts, to such an extent that there is a use. This place is designated. So there is an element of purpose there which would not be present if the relationship between the parties were not such as this.

The argument as to whether he just stumbled on that [288] name falls by the wayside. He chose it deliberately with a purpose, and used it for that purpose.

Mr. Beehler: Nowhere in the testimony is there a fact which points to the intention of the defend-

ant to take advantage of the good will of the plaintiff.

The Court: There does not have to be. The deliberate choice of a name is enough.

In the Brooks case, the reason the man chose "Brooks" was because a salesman told him it was a nice name. It was better than "Greenberg" for attracting customers.

Mr. Beehler: Here the facts show that the businesses of the two companies are alien to each other.

The Court: That is merely a corporate name. The father is a partner in this business. As I glanced through this deposition, even without reading the entire deposition, it is quite apparent that the two of them worked together, because otherwise, if he were only a depositor, just as somebody else, the father would not advertise his national business as having an outlet here, the only outlet he advertises in conjunction with his own, and the fact that there is no showing that at any other time were any lamps of any other concern featured. There is the family relationship between the parties, shown by the fact that the father is a defendant in this lawsuit and is a part of the corporation here, which puts an entirely different light upon this case, than if the name had been [289] fortuitous. And when you bear in mind that the company in Illinois specializes in making lamps, then you can see the willfulness and the intent there.

Mr. Beehler: If we are to dwell on the activities of the Illinois company—

The Court: They are a part of them because

the father is, also. The father is a party to this lawsuit. He is one of the corporation. The father is also the head of the corporation there. Judges cannot shut their eyes to realities.

Mr. Beehler: Our evidence shows——

The Court: The evidence also shows that the one is tied to the other, such as, for instance, in the advertisement you yourself put in.

It is strange indeed that a national concern should use one company as an outlet, unless there were a peculiar relationship between the two, and the relationship arises from the fact it is a family corporation, controlled by members of one family, which is perfectly all right.

The son cannot say, "I have nothing to do with that corporation," when his father, who is the head of that corporation, is a part of this very corporation. So that when he pushes this particular item, he has to take the full consequences of the relationship.

Mr. Beehler: Our evidence shows that the father and the Expert Lamp Company used the name "Sunbeam" for 25 years. [290]

The Court: That is all right. That does not settle the matter.

Mr. Beehler: It is not inferred by act or deed or any evidence that the use on the part of the Expert Lamp Company of the word "Sunbeam," their desire to continue the use of that, is to protect a business——

The Court: That is a good business argument to make, but it is not a legal argument, because

you know very well in the Emerson case and all those cases people were stopped from using the name, who were entitled to use the name because it was their own personal name. Nevertheless, when they used it they used it in such a manner as to create confusion. The mere fact it was their given name did not help them in the matter. You have not attacked the validity of this trade-mark.

Mr. Beehler: Where the defendant has developed his own good will and where the trade turns to him because of his own good will—and that is all that has been shown here—

The Court: That is a good argument on the damages. But they have waived damages. They had better waive them because they have not made any showing that the damage has resulted, which could be transmuted in the form of damages.

Furthermore, they remember the ruling in the case that laches might stand in the way of recovery, as they did in the other case. But prior use does not enter into this [291] matter at all, as where a man has acquired a prior local use. A prior local use means absolutely nothing, as against a person who has developed a product and associated a name with it to such an extent that in the mind of the public the one spells the other.

Let me give you an illustration of a case, and I mentioned this case in the other lawsuit, and Mr. Mason said that he had tried that case before me. I did not remember, because, as you know, I do not remember personalities of lawyers. I know

lawyers that come before me, but whether a lawyer is in one case or another I do not remember.

That same argument was made in the other case. I called attention to an incident that happened when I was on the Superior Court. A man had used a street signal, an old-fashioned street signal, as an emblem, as a trade name for a gas station.

A suit was brought by Signal Oil Company who had adopted the signal and been incorporated under that name, and used it for many, many years. I held that the prior use by the man was not such as to prevent Signal Oil Company from claiming its use, and from establishing, as they did in that case, the secondary meaning of the emblem and the association with the products of the Signal Oil Company.

Mr. Beehler: If that argument is carried through to its ultimate conclusion, then, as the court in Illinois said, [292] "Why make a distinction in trade-marks at all?" If by adopting a word and by putting enough money behind its advertising a company can get the public to think about that word as theirs, why not give them a right to that mark absolutely?

The Court: I am not interested in what the court in Illinois said. I am interested in what my circuit, the Court of Appeals, has said. I am bound by what they say. I am sending a lot of business to them, too, to try under the new transfer rules. But I am not bound by what a judge in Illinois says, any more than he would be bound by what

I say here. I am bound by the rules of this circuit and I am not bound by the rules of their circuit.

Very recently one of their judges and I disagreed. It happened he was wrong and I was right. I would not stop the trial of a case to wait until the Supreme Court decided his case, because I knew he was so dead wrong. That was the rent case. The result was, as I anticipated, that he was reversed and my decision was upheld.

Mr. Beehler: Here is a case—

The Court: So I am not bound by a court of another circuit, by what it says. I realize that the courts in other circuits have not stated the doctrine so clearly, but next to the Second Circuit the Ninth Circuit has stated the law of unfair competition in such clear words that there is no room for trying to distinguish away the cases. Nothing could be [293] clearer than the language in the last four cases, which include the Brooks case, and I did not mention that case because it is mine. After all, they adopted it. They did not write an opinion of their own. They adopted it. You know what happened in that case.

There were four cases. The Brooks case, the Stork Club case, the Safeway case, the Lerner case, and the Maternity Lane case: those contain all the law of the circuit, and they are up to date. [294]

Mr. Beehler: If we refer to the Lerner case, there the court held there was not a likelihood of confusion.

The Court: But there was a proper name case.

There was a man using his own name in running a store in San Jose, a place where Lerner stores did not have an outlet. Furthermore, when the question arose the man did not call it Lerner Stores, but put his first name in front of Lerner and also put a line under it saying, "Locally owned."

Mr. Beehler: Here is a case where two companies are in unrelated businesses. The Sunbeam Corporation has never invaded the business of the defendant, because it has never engaged in the home furnishings business.

The defendant has never invaded the business of the plaintiff, because it sells only home furnishings and has never sold any electrical appliances.

The Court: Except lamps.

Mr. Beehler: No one here with their testimony has identified lamps as electrical appliances.

The Court: They do not have to do that. The court can make that conclusion.

Mr. Beehler: There is an abundance of testimony here in this case which is uncontradicted, that lamps are a matter of interior decoration. They are bought from the point of view of interior harmony, and not upon electrical performance. It is that point, your Honor, that we place much reliance upon. [295]

The Court: I ruled against that in the other case. If your contention is correct, then my decision in the other case is wrong. I think it is perfectly right. While it is not final, it is conclusive on me unless new facts are brought to my attention. Under

your contention I decided that case wrong and I do not think I did.

Mr. Beehler: I am familiar with the facts in that case. The product was fluorescent lights. In that case, or, rather, in respect to fluorescent lights, they are bought on electrical performance. They are not bought from the point of view of interior decoration.

The Court: You merely read the short memorandum I wrote.

Mr. Beehler: Yes.

The Court: You did not hear the testimony of contractors from all over the country and even some from the School Board who testified that to them fluorescent lights have nothing to do with the desk lamps.

As a matter of fact, the entire case was built by Mr. Mason upon that proposition, that it was a separate segment of an industry. He produced catalogs to show that it was unrelated, which were some of these national books they put out, to show that fluorescent lights are not classified as electrical appliances or fixtures or anything of the kind. They are of a separate classification. The doctrine of classification [296] was made the subject of very extensive proof.

Mr. Beehler: It is our contention that the kind of lamps we handle are not in the same category as the fluorescent lamps or the desk lamps of the other case.

The kind of lamps and the kind of trade that is interested in the decorative lamps of the defend-

ant are not the kind of trade that are interested in fluorescent fixtures, on the ceiling, even. And that they look to buying a living room set and not even the plaintiff will contend that Sunbeam relates to living room sets. If the customer is buying a living room set and it is in the Victorian period, he wants a lamp in the Victorian period, whether it is Sunbeam or anything else.

The Court: I can find no justification for such splitting the segmentation of business in the law of unfair competition and the law of trade-mark.

Mr. Beehler: There must be a dividing line some place.

The Court: It is an equitable principle that has been developed by the courts. The courts do get some credit sometimes. It is an equitable principle that has been developed by courts because of the bad business ethics of business people. Business people always hold themselves to be superior to we lawyers and judges. It is well to remember that courts developed the doctrine of unfair competition because of the rotten stealing methods of certain business [297] men, of stealing the other man's products, so that the courts evolved this system of stopping piracy.

Mr. Beehler: I don't think the defendant can be charged with stealing any good will.

The Court: That is the disadvantage of having your client sitting here. He will think I am talking about him. I am not talking about him. I am talking to a subject and I am not talking about the defendants in this case.

I am saying this entire law is equitable. Therefore, the trend is not to split hairs, but to give a broad concept.

I will refer you to the Restatement. The Restatement represents the distillation of scholars who sought to distil to their minimum the principle upon which all men agree. The Restatement says specifically that confusion may arise in an entirely unrelated field.

Mr. Beehler: I would also like to touch upon the question of alleged trade-mark infringement. Taking the facts at their worse, there are three labels involved here; let us say, rather, three tags. The defendant has a price tag which it uses. It says on it "Sunbeam Furniture Corporation." It gives its address.

The defendant also handles merchandise in package form, some lamps, and those lamps carry a tag, too. It is a very distinctive tag. It is a blue tag with a gold seal on it. They are all alike. They say "Sunbeam." True enough, there [298] is an initial on it, an L that forms a background for the lettering. On it in bold face type, and smaller, admittedly, but in bold face type is the name and address of the manufacturer. It is not concealed, not misrepresented.

The plaintiff has its own tags on red and white paper, and some are black and red and various colors, but every place the word "Sunbeam" is written in a particularly characteristic way, and shown throughout, it trade-marks the same way.

Aside from the fact that the name is "Sunbeam,"

there isn't any similarity at all in the tags affixed to the merchandise. There isn't anything about the tags of the Expert Lamp Company or the Sunbeam Furniture Corporation which does anything more than boost to the public they stand behind their own goods. Their own name is there. Their own address is there. They don't simulate an appearance of the plaintiff's goods or the plaintiff's mark in any way. Therefore, there is no trade-mark infringement.

Further, still on the part of the defendant here in this case, which is not the Expert Lamp Company, it uses no trade-mark at all at any time. Its price tag never leaves its own premises. There is no positive evidence in this case which can commit the defendant here to a charge of trade-mark infringement.

We have touched on the matter of unfair competition. I have the benefit of your Honor's remarks. I have attempted [299] to make our contention clear.

I feel that the facts are as we have presented them, and they do not show unfair competition, either under California law or federal law. And that since it also does not show a trade-mark infringement we cannot be charged with an injunction.

The Court: I want to call your attention to a section in the Restatement. It is Section 714. It is a statement which bears a good deal upon the proposition.

That it is not even necessary for the buyer to know that a trade-mark comes from a particular

source. This is what it says under paragraph b under Comments of Section 715:

"In the market, the chief value of a trade-mark may be its power to stimulate sales. In law, the fundamental theory upon which the interest in a trade-mark is protected is that a trade-mark identifies the goods coming from a particular source, or passing through a particular channel of distribution, and that an infringing designation tends to divert custom from that source by falsely representing that other goods come from it. Compare Sections 730-732. But this theory does not mean that the trade-mark indicates a source known to purchasers. It means only that a trade-mark indicates that the [300] goods in connection with which it is used come from a common source, whether the source is known or anonymous; that one article of a class of goods bearing the trade-mark comes from the same source as all other articles of that class which bear the same trade-mark. One may, therefore, have a trade-mark for goods which he markets as manufacturer, jobber, wholesaler or retailer. And one may have several trade-marks, even for goods of the same kind."

Then in the portion relating to unfair competition, the Restatement says that in the last analysis, except for the origin of the rights of protection, there is no difference between infringement of a trade-mark and unfair competition.

Under paragraph a of the Comment of Section 717 it says:

“The language of some opinions indicates that there are such differences: that for infringement of the former the appropriate remedy is an action for trade-mark infringement, while for infringement of the latter the appropriate remedy is an action for unfair competition, that ‘fraud’ on the part of the actor is essential in trade name infringement but not in trade-mark infringement and that the scope of relief against the one is [301] narrower than that against the other.”

One is narrower than the other. Then it says, “First, there are at present no important differences in the procedure.”

And then, “Second, there is no real distinction, with reference to the element of fraud, between the infringement of trade-marks and trade names as defined in Section 716.

“In the earliest cases, no discrimination was drawn between designations which are now called trade-marks and those which are now called trade names. The issue in each case, was whether the defendant imitated the marks, labels or dress of the plaintiff’s goods for the purpose of passing off other goods as those of the plaintiff’s manufacture. The action at law was an action on the case in the nature of deceit.”

Then going on:

“Subsequently, equity courts began to try the legal right themselves. Because of the distinctiveness of the trade-mark which identified the manufacture of one person exclusively, some equity judges began to regard the trade-mark itself as the ‘property’ of that person.”

Then going on further it states:

“A trade name is, however, no less [302] effective than a trade-mark as a means of identification. Whether a designation identifies the goods of one person is a question of fact necessary to be answered in determining whether the designation is a trade name. When that determination is made, there is no more reason for a requirement of ‘fraud’ in the trade name cases than in the trade-mark cases. It is only when the plaintiff’s designation is neither a trade-mark nor a trade name, and the case is considered under the rule stated in Section 712, that fraud is an essential element of liability.”

Then as to the Elements of Infringement it says:

“The liability imposed under the rule stated in this Section protects a person against harm to his business which the actor might cause by misleading prospective purchasers into identifying the actor’s goods, services or business with those of the other. The ultimate issue in infringement cases——”

and they mean both of them.

“——is the likelihood that prospective purchasers will be so misled.”

So that the actual misleading is not material. It may have a bearing on damages. The law does not allow general [303] damages, but actual loss of money in dollars and cents. There, of course, the fact whether there was loss of customers would become material. [304]

So I am referring to these statements to show that in the last analysis the same principles underlie both branches of the case as now understood. I agree that in the early cases you can draw a lot of finespun distinctions, but the law has been so clarified in the last few years by writers like Chaffee and others, that some of the dicta in the older cases lose all significance. So I think in the last analysis if the plaintiff is entitled to recover at all, the same facts that would entitle him to recover under one would entitle him to recover under the other, as it stands now, without the requirement of damages. If he is entitled to an injunction under the unfair competition, which is infringement of trade name, he is entitled to it under the other, because the validity of the trade-mark has not been attacked.

Mr. Beehler: In response to that, if there is any trade name here, the use of which is chargeable to the defendant, it has to be the trade name “Sunbeam” which appears on the tag of the Expert Lamp Company.

The Court: If a man exhibits a lamp with the

tag, he is just as liable primarily as the manufacturer.

Mr. Beehler: There is a case which holds, and I quote, "One who buys another's goods may use or sell them with the latter's trade-mark on them." That language appears in the case of B.V.D. vs. De Vega City Radio, 16 Fed. Supp. 659.

The Court: That is a general statement that might be [305] approved, but it does not settle this particular case. It does not mean if a man uses an emblem which is visible, not a hidden mark, in selling a product, he can avoid responsibility by merely claiming that it wasn't his trade-mark.

It would not apply to a case of this character, because the evidence shows clearly, in the first place, that these tags were very large, could be seen easily. Even I, who is nearsighted, can read the script on the large one without using my glasses. And it works the other way, because in this particular case where the trade-mark is not embedded into something solid, there is nothing to prevent him from tearing off the tag and selling it without it.

A statement of that character doesn't mean anything. I agree with you if it appeared that somebody casually got one lamp and sold it under the label, that you couldn't make out a very strong case for injunction enjoining him from doing the same thing in the future. But that is not the situation here. You have at least one person who is connected with both corporations, who pushes the merchandise, features it in the window, and facts like that, which have to be considered.

Mr. Beehler: I would also like to comment briefly, on that same point, on some of the cases the plaintiff apparently relied upon. He cited the case of Saratoga Vichy. But in that case, although the defendant used water bottled [306] by somebody else, he put his own trade-mark on it before he sold it.

The Court: The Vichy case turned on the fact that for many years people had been allowed to use the name, and the Supreme Court said that they are not going to, at this late date, 20 or 25 years after the name Vichy had come into use, allow them to clamp down a monopoly. But when it came to the Dubonnet case, the courts did it the other way.

You gentlemen have educated me in the last 14 years. When I got on this bench I did not know very much about this branch of the law, because I had been a judge of the Superior Court and we didn't have many of these cases, although I did have some of these cases even there. But now I have had so many of these that I know those cases myself.

Mr. Beehler: All of these cases which the plaintiff has cited, there was some element of falseness in them.

The Court: I agree with you that the old cases so state. That is why I read this statement from the Restatement, because the Restatement says now that the element of palming off, the element of fraud, is no longer necessary.

Judge Garrett in the Stork case—

Mr. Beehler: Even in the Stork case they were both in the restaurant business.

The Court: In the Stork case he lays down the rule, the rule which the Restatement adopts, and it is a very elaborate [307] opinion. He subdivides it into paragraphs and treats each separately. I like that way of writing opinions. That is the way I always have written opinions.

Mr. Beehler: There they had a fanciful name, Stork Club, and—

The Court: But he lays down the rule that the element of good faith is not an element at all.

I am trying to reduce our area of disagreement as much as possible, if I can.

By the way, in this case he has a subhead, "Trade names and trade-marks stand on a similar footing." I assume he wrote that himself, because it is part of the opinion. I know I do that. He gave us his summary of the law.

Mr. Beehler: There was no intermediary there, like there is here.

The Court: I understand that. He quotes from *Hanover Star Milling Company vs. Metcalf*, on page 354 of the *Sahati* case:

"This essential element is the same in trade-mark cases as in case of unfair competition unaccompanied with trade-mark infringement. In fact, the common law of trade-marks is but a part of the broader law of unfair competition. \* \* \*

"The appellees insist that, because of [308] their 'most humble field of operation' they cannot be considered to be in competition with the appellant, whose place 'is of the highest.' Since they are not in competition at all, obviously—so runs their argument—they cannot be in unfair competition with the appellant. Plausible as this contention may seem, it does not correctly state the law."

Then he cites the *Academy of Motion Picture Arts and Sciences vs. Benson*.

He cites this statement:

"A very recent statement of the doctrine is to be found in *Hanson vs. Triangle Publications*, 8 Cir., 1947, \* \* \*: 'there can be unfair competition although the businesses involved are not directly competitive. Under present general law, the use of another's mark or name, even in a non-competitive field, where the object of the user is to trade on the other's reputation and good will, where that necessarily will be the result, may constitute unfair competition.'

The *Academy of Motion Picture Arts and Sciences vs. Benson* is a very good illustration in California, because there they were entirely different fields. The *Academy of [309] Arts and Sciences*, as we know, is this group representing producers and others interested in the motion picture art to award Oscars. You read this morning's newspaper about the nominees for the Oscars, which are the

prizes. And this man was running a school, an entirely different field. Nevertheless, the Supreme Court of California said that it didn't make any difference.

Mr. Beehler: Here the defendant has attempted to avoid trading upon the good will of the plaintiff by relating the goods to itself every time. When it sells lamps of the Expert Lamp Company, it identifies the source particularly. And with respect to itself, it does only a wholesaler's trading business, and does not play upon the name "Sunbeam."

The Court: In this Academy of Motion Picture Arts and Sciences vs. Benson, to which I have already referred, the defendant conducted a dramatic and coaching school and called it "The Hollywood Motion Picture Academy." There wasn't even very much similarity in names, except they used "Motion Picture Academy" while the other used "Academy of Motion Picture Arts and Sciences." Certainly the Hollywood Academy of Motion Picture Arts and Sciences is not engaged in coaching or anything of the kind. That problem was raised there. Here is what the Supreme Court of California said, and this is a unanimous opinion written by Judge Shenk. He began his career as a judge of the Superior Court of this County. This is [310] in 15 Cal. (2d) 685. It is cited in those cases I referred to yesterday. This is what he said. The court pointed to the fact that it is novel in that it involved an entirely different field, that a coaching school had absolutely nothing to do with the business of the plaintiff. This is what the court said,

after referring to its prior case American Philatelic Society, at page 692:

“And it does not appear necessary that the parties be in competitive businesses or that the injury has already occurred. It is sufficient if the names, although not identical, are sufficiently similar to cause confusion and injury.”

And they cite quite a number of cases, including the Celluloid Manufacturing Company vs. Cellonite Manufacturing Company, and they repeat the statement that I have already read into the record from the Cellonite case, saying: “Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law.”

While the actual number of decisions in which the field is the same is greater, there are cases, and this Academy case is one of them, which applied the rule to entirely [311] dissimilar fields. Judge Garrett, speaking for the Circuit, adopts the very language that I just read as stating the law, because there it was argued that this humble saloon should not be compared with the topnotch Stork Club. But in the Benson case you have an even greater dissimilarity because one of them was a group of motion picture personalities associated for the purpose of mutual protection, and for the purpose of

awarding prizes each year to the best acting in the field of motion pictures, and the other one was an humble woman who was teaching, coaching actors and actresses, who called herself the Academy, and yet the court said specifically that the dissimilarity is not in itself sufficient.

Mr. Beehler: I can conclude, and I would like to conclude by making this reference to the evidence which has been before us the last day and a half, namely——

The Court: I am not stopping you. As a matter of fact, you were ready to sit down when I made you stand up again.

You know my system. If you don't, Mr. Huebner knows it, because he has been before me more often than you. That is the only way I know of of clarifying my own thoughts, that is why I like oral argument rather than briefs, because I cannot ask questions of a brief, but I can ask questions of the man who writes the brief, so I do it to clarify my thoughts. I do not mean to curtail your argument. I am merely telling [312] you what my conception of the law is so you will have an opportunity to answer if you can.

Mr. Beehler: A summary of the evidence that we have had here, all of the direct evidence, if you might call it that, which relates to how the goods appear, has been almost entirely pointing to the fact that there is no confusion, there is no actual confusion, that there are no instances of confusion directly. On the other hand, there were the surveys, and it is only the surveys which appear to indicate

that there is likelihood of confusion, and it is our contention that those surveys were engineered, taken under unnatural circumstances, and that that should be weighed against the other testimony which points in the other direction. With that I conclude, your Honor.

The Court: All right.

Mr. Pattishall: Although I disagree with almost everything Mr. Beehler has said, your Honor, I do not think any purpose would be served by further argument.

Thank you for your courtesies, sir.

The Court: There is one matter I want to take up. There is an exhibit mentioned in this deposition.

Mr. Pattishall: That exhibit is the same photograph of a lamp that is attached to the complaint, and that is Exhibit D, I believe, your Honor. I think that was a reference to the original [313] complaint.

Mr. Beehler: Isn't that the same as Exhibit 1 in evidence?

Mr. Pattishall: No. That is the more recent lamp.

The Court: Let me take a short recess. It won't take me more than 15 minutes to read this deposition. I don't know what is in it. I think I would rather read it before I excuse you. So let's have a recess and I will read the deposition, and then I will see if any thought occurs to me.

(A recess was taken.) [314]

\* \* \*

“Even assuming the absence of any competition of toilet tissues and Dunnell’s covers for protection of toilet users, Stores is entitled to its injunction. The principle is well stated in Judge Learned Hand’s opinion in *Yale Electric Corporation v. Robertson*, 2 Cir., 26 Fed. (2d) 972, at page 974, ‘However, it has of recent years been [344] recognized that a merchant may have a sufficient economic interest in the use of his trade-mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner’s reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower’s use is so foreign to the owner’s as to insure against any identification of the two, it is unlawful.’”

\* \* \*

“The appellees insist that, because of [345] their ‘most humble field of operation’ they cannot be considered to be in competition with the appellant whose place ‘is of the highest.’ Since they are not in competition at all, obviously—so runs their argument—they cannot be in unfair

competition with the appellant. Plausible as this contention may seem, it does not correctly state the law.” [346]

\* \* \*

“The law of unfair trade comes down very nearly to this—as judges have repeated again and again—that one merchant shall not divert customers from another by representing what he sells as emanating from the second. This has been, and perhaps even more now is, the whole Law and the Prophets on the subject, though it assumes many guises. Therefore, it was at first a debatable point whether a merchant’s good will, indicated by his mark, could extend beyond such goods as he sold. How could he lose bargains which he had no means to fill? What harm did it do a chewing-gum maker to have an ironmonger use his trade-mark? The law often ignores the nicer sensibilities.” [348]

\* \* \*

“It is true that the complaint contained no allegation of actual business competition between the parties. However, defendant did not demur upon that ground, and at the trial made no objection to evidence which, as hereinafter stated, clearly proved the existence of such competition.” [350]

\* \* \*

“It is unnecessary, in such an action, to show that any person has been confused or deceived.

It is the likelihood of deception which the remedy may be invoked to prevent. \* \* \* 'It is sufficient if injury to the plaintiff's business is threatened, or imminent, to authorize the court to intervene to prevent its occurrence.' ''

Skipping some lines, and reading from page 70:

"Appellant argues that the record shows that plaintiff and defendant do not manufacture the same items or solicit the same trade and customers. Plaintiff's name has become a valuable asset in connection with any equipment associated with automobiles, and the evidence shows that the bulk of defendant's business is manufacturing automobile jacks and wrenches. However, it is not always necessary to prove actual market competition where the purpose of the action is to [351] secure injunctive relief. It was stated in *Wood v. Peffer*, 'We are aware, however, that equity may be invoked without market competition. Emphasis should be placed on the word "unfair" rather than "competition.' ''"

"Plaintiff has established a reputation for reliability and meritorious products. If articles which are not produced by him are attributed to him or associated with his name the injury is obvious. The court stated in the case of *Del Monte Special Food Company v. California Packing Corporation*, 34 Fed. (2d) 774, at page 775: 'The injury to the appellee by the use of the Del Monte Brand by the appellant does not result from preventing sale by appellee of oleo-

margarine of its own, but from a representation to the public that it produces a product which it does not in fact produce and over which it has no control. Its reputation for quality is therefore placed to some extent in the hands of a corporation who owes it no allegiance and has no concern in maintaining the high reputation established by the appellee, and who may utilize that reputation to sell the public an inferior production.' Furthermore, [352] in the interest of fair dealing courts of equity will protect the person first in the field doing business under a given name to the extent necessary to prevent deceit and fraud upon his business and upon the public. For this purpose the second in the field may be enjoined from using the name, even though the principal places of business are at a considerable distance from each other. \* \* \* 'No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself. Unfair competition is a question of fact. . . . The universal test is whether the public is likely to be deceived.' " [353]

\* \* \*

"I did not intend to rule, and could not very well rule, under the law of the Ninth Circuit, that the mere fact that the custom of the late comer came from a limited segment of an industry is sufficient to avoid infringement. Indeed, the rule is the other way. For, if there is

any principle established firmly in the law of the Ninth Circuit, and in the law of California, which must govern the unfair competition phase of the case,—it is that infringement and unfair competition may be found to exist as between non-competitive fields and products.”

I cited the Safeway case and the Stork Restaurant cases, and then I continued:

“And it is implicit in the last decision of our Court of Appeals on the subject, *Lane Bryant, Inc., v. Maternity Lane, Limited, of California*, Ninth Circuit, 173 F. 2d 559, and in the leading California cases which have, time and again, been referred to by our courts in disposing of these matters.” [354]

\* \* \*

“All these cases adopt as the test, the effect of imitation on the average person and stress the point that the power of a court of equity may be invoked ‘without market competition.’ They do not limit the application of the rule to fanciful names. They apply it to ordinary names when they have acquired a secondary meaning, i.e., they have become so associated with a product as to create what the Restatement (Restatement, Torts, sec. 730) calls ‘confusion of source’ in the minds of the public. Any other rule would be unrealistic and encourage deception and fraud.” [355]

\* \* \*

[Endorsed]: No. 12628. United States Court of Appeals for the Ninth Circuit. Sunbeam Furniture Corp., Arthur M. Luster, Melvin R. Luster and Frieda Luster, doing business as Sunbeam Furniture Sales Co., Appellants, vs. Sunbeam Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 29, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

Appeal No. 12,628

SUNBEAM FURNITURE CORP., a Corporation;  
ARTHUR M. LUSTER, MELVIN R. LUSTER  
and FRIEDA LUSTER, Individuals  
Doing Business as SUNBEAM FURNITURE  
SALES CO.,

Appellants,

vs.

SUNBEAM CORPORATION, a Corporation,

Appellee.

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE PRINTED RECORD ON APPEAL

To the Clerk of the United States Court of Appeals  
for the Ninth Circuit

No Statement of Points on Appeal or Appellants' Designation of Contents of Record on Appeal having been served by appellants on appellee or on any of its attorneys as required by Rule 19(6) of the Rules of Practice of this Court, appellee hereby submits, within ten days after receiving from the clerk of this Court actual notice, on October 31, 1950, of the filing in this Court of the appellants' State-

ment of Points on Appeal and Designation of Contents of Record on Appeal, the following as its Designation of Additional Parts of the Record, Proceedings, and Evidence to be Contained in the printed Record on Appeal:

(1.) The entire Reporter's Transcript of Proceedings, Pages 1 through 366, inclusive, the same being, in addition to the portions designated by appellants, the following:

1. Pages 79 through 188, inclusive.
2. Pages 279, line 24, through 314, inclusive.
3. Pages 344, line 19, through page 345, line 17.
4. Page 345, line 25, through page 346, line 8.
5. Page 348, line 6, through line 20.
6. Page 350, line 9, through line 15.
7. Page 351, line 8, through line 25.
8. All of pages 352 and page 353, line 1 through 15.
9. Pages 354, line 3, through line 23.
10. Page 355, line 1 through 366, inclusive.

(2.) This designation.

The Clerk of the United States Court of Appeals for the Ninth Circuit is accordingly requested to print and include the foregoing designated material

in the printed record in the above-entitled case now on appeal to this court.

Dated this 3rd day of November, 1950.

ROGERS AND WOODSON,

By /s/ BEVERLY L. PATTISHALL,  
Attorneys for Appellee.

A copy of the foregoing Appellee's Designation of Additional Parts of the Record, Proceedings and Evidence to be Contained in the printed Record on Appeal was served on Huebner, Beehler, Worrel and Herzig, 610 South Broadway, Los Angeles 14, California, by regular mail, postage prepaid, this 3rd day of November, 1950.

BEVERLY L. PATTISHALL,  
Attorney for Appellee.

[Endorsed]: Filed November 6, 1950.